

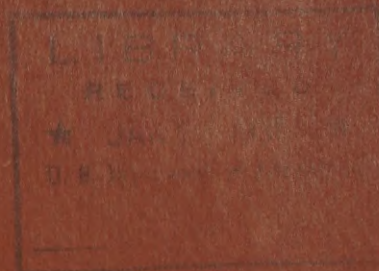


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**COMPILATION OF OPINIONS
OF THE
AGRICULTURAL ADJUSTMENT ADMINISTRATION**

VOLUME III

Opinion Nos. 100 to 142; August 1, 1934, to September 28, 1934.

APPENDIX

**Opinion Section
Office of the General Counsel,
Agricultural Adjustment Administration.**

PROCESSING TAX PROBLEMS WITH RESPECT
TO 1935 PROGRAM

Under the Agricultural Adjustment Act, unless the device of a compensating tax be used, no processing tax may be imposed upon dairy products unless benefit payments are made to producers of milk. If such benefit payments be made, they need not be so large as to exhaust the fund raised by the processing tax on dairy products, and the excess may be used for the 1935 feed grain program.

A tax may be placed upon manufactured dairy products without taxing whole milk.

The proceeds of processing taxes upon small grains may be used to finance benefit payments with respect to the basic small grains.

Under Section 9(a), whenever the Secretary sets a new rate for a processing tax, he must fix such rate at no more than the difference between the then fair exchange value and the then current average farm price; however, it is within his discretion to determine at what time the new rate is to be set. In exercising this discretion he is bound by the declared policy that he shall not only establish but shall maintain a parity price.

August 1, 1934.

MEMORANDUM TO MR. A. G. BLACK, CHAIRMAN
GENERAL COMMITTEE ON 1935 PROGRAM

Pursuant to your request dated July 24, 1934, addressed to Mr. Hiss, I submit my opinion upon the following:

QUESTION II

Under what conditions can dairy products be taxed for a 1935 feed grain program? Can manufactured dairy products be taxed without placing a tax on whole milk?

QUESTION III

Can processing taxes on small grains be lumped in a general fund and used to finance a combined small grain program? Can all taxes be lumped into a general fund?

QUESTION IV

How long can processing taxes on any basic commodity continue to be collected after the price reaches parity? After the fair exchange allowance becomes less than the tax rate?

OPINION

II. Unless the device of a compensating tax be used, dairy products may not have a processing tax imposed upon them unless some benefit payments are made to the producers of milk. However, if such benefit payments be made, they need not be so large as to exhaust the complete fund raised for the processing tax on dairy products and the excess may be used for 1935 feed grain program.

A tax may be placed on manufactured dairy products without taxing whole milk. This may be done either by the power granted the Secretary under Section 11 of the Agricultural Adjustment Act or under Section 9 (b) thereof.

III. The answer to Question III is in the affirmative.

IV Until the facts of the situation are presented, no definite opinion can be rendered but this much can be said. There is no requirement that the Secretary change the tax rate on any commodity with every change in price of that commodity, and thus, though the fair exchange allowance become less than the tax rate, the tax rate need not necessarily be lowered. The reason for this is that the Secretary is given the power to set the rate from time to time and only when he does set a new rate, is he bound to apply the formula of fair exchange value. However, not until the Secretary decides that the price of a commodity is stabilized at a new level need he set a new tax rate. This answer to the question concerning fair exchange allowance will serve as an answer to the first part of Question IV about parity price.

DISCUSSION

II.

Section 9 (a) of the Agricultural Adjustment Act provides that processing taxes can only be levied on a basic agricultural commodity when rental or benefit payments are to be made with respect thereto. This calls for payments, because of the terms of Section 9 (a), to the producers of milk.

It has been argued that a reduction in the amount of feed grain produced would lead to the reduction in the amount of milk produced and that therefore a tax may be placed on milk processing for this purpose without making benefit payments to milk producers. However, this argument invalidly assumes that a processing tax can be put into effect to accomplish any reduction in the production for market, but Section 9 (a) only permits processing taxes to be levied where part of the reduction program calls for benefit payments to the producer. Therefore, before a processing tax can be placed on milk, some benefit payment scheme for milk producers must be put into effect. See Opini. No. 143.

To avoid benefit payments to milk producers, compensating taxes instead of a processing tax may be imposed upon certain manufactured milk products on the ground that they have obtained a competitive advantage over cotton seed oil and other fats now subject to processing taxes. If the facts support such a compensating tax, there seems to be no reasonable objection thereto. The problems raised by employing the device of such a tax are in the main those of public policy with which this memorandum is not now concerned.

Assuming that a processing tax has been placed upon milk products, if the benefit payments are less than the tax receipts, a surplus of funds will exist. Then, by the terms of Section 12 (b)

of the Act, the money may be used for a reduction program in feed grain. Section 12 (b) permits the Secretary of Agriculture to use the funds raised by processing taxes for rental and benefit payments in the feed grain program.

The second part of the question concerns the possibility of placing a processing tax on manufactured dairy products without taxing whole milk. Under the terms of Section 9 (b) of the Agricultural Adjustment Act, the Secretary might begin by announcing a processing tax on all milk and if upon investigation he found that the tax on whole milk was such that it would lead to an accumulation of surplus stock and the depression of farm prices of the commodity, he might abolish the tax on that part of the manufactured commodity. The provisions in Section 9 (b) read:

"If thereupon the Secretary finds that may such result will occur, then the processing tax on the processing of the commodity generally, or for any designated use or uses, or as to any designated product or products thereof . . . shall be at such rate as will prevent such accumulation of surplus stocks and depression of the farm price of the commodity."

Therefore, by the terms of this provision, the Secretary may abolish any processing tax on whole milk and retain it on other dairy products made from milk, if and only if he finds that any tax on whole milk will result in the accumulation of surplus stocks and the depression of farm prices of whole milk.

Use might also be made of Section 11 of the Agricultural Adjustment Act, if the Secretary finds that Title I of the Act cannot be effectively administered with respect to whole milk. The Secretary of Agriculture may then classify the products of milk and put a benefit program into effect only for some of the dairy products. Thereby a processing tax on such products could be levied. However, this would seem to call for a benefit program in which payments are made only to producers of milk used for such products. Under the factors operating in the industry this might permit payments to any producer of milk. If the facts will not support so broad a distribution of benefit payments the funds raised by the processing tax might in part be diverted under a removal of milk surplus program which would treat all producers of milk equally. Thus a program could be constructed by which all dairymen received similar payments but part of such payments would nominally be made in pursuit of a reduction program for part of the dairy products, namely those subjected to processing tax and the rest treated under a removal of surplus program. Thus by employing either of these provisions of the Agricultural Adjustment Act a processing tax can be confined to manufactured dairy products and to the exclusion of a tax on whole milk, while at the same time a uniform payment may be made to all milk producers and any excess funds be used for the feed grain program.

III.

In answer to Question III, Section 12 (b) of the Agricultural Adjustment Act under which the proceeds of the processing taxes are appropriated to the use of the Agricultural Adjustment Administration in fact lumps all processing tax receipts into a single general fund. It is only a matter of policy which has led the Administration to see that the proceeds from any processing tax on a given basic commodity were used in benefit payments on such commodities. See Opin. No. 85.

If a benefit program be proclaimed in effect for each of the small grains then a processing tax can be put into effect upon such of them as are basic commodities. Thereafter, the proceeds would become appropriated as part of the general fund for the administration of the Agricultural Adjustment Act and the carrying out of its purposes. From this same fund, if it is deemed necessary, funds may be used to finance benefit payments in the basic small grains.

IV.

In answer to Question IV I wish to say that Section 9 (a) of the Agricultural Adjustment Act provides that whenever the Secretary shall set a new rate, he must fix such rate at no more than the difference between the then fair exchange value and the then current average farm price. However, it is in his discretion to determine at what time the new rate is to be set. In exercising this discretion he is bound by the declaration of policy of the Act which requires in Section 2 (1) that he not only establish parity price but maintain such parity price. Therefore, if for a certain period of time parity price is achieved, the Secretary can continue the program in reference to such commodity if he believes that the removal of the program will lead to a drop in the price. It is only when the Secretary decides that such price will maintain itself without Government aid that he must abandon the program.

Telford Taylor,
Acting Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 102

ACTION TO COMPEL LICENSEES TO
FURNISH INFORMATION

Neither the Market Administrator nor the Control Committee, appointed under the terms of a license issued pursuant to the Agricultural Adjustment Act, may bring an action to compel licensees to make reports and furnish information.

Enforcement of these license-imposed obligations apparently must be made by the several District Attorneys as provided for in Section 8a(7) of the Agricultural Adjustment Act as amended, or by the Attorney General on behalf of the United States.

August 1, 1934.

MEMORANDUM TO MR. BACHRACH

Pursuant to your request, I submit herewith an opinion upon the following:

QUESTION

May a Market Administrator, appointed under the terms of a license issued pursuant to the Agricultural Adjustment Act, bring an action in his own name to compel licensees to make reports and furnish information to him?

May a Control Committee, established under a license issued pursuant to the Agricultural Adjustment Act, bring an action, in the name of its individual members, to compel licensees to make reports and furnish information to it?

OPINION

I am of the opinion that neither the Market Administrator nor the Control Committee may bring an action to compel licensees to make reports and furnish information. Enforcement of these license-imposed obligations apparently must be made by the several district attorneys as provided for in Section 8 a (7) of the Agricultural Adjustment Act, or by the Attorney General on behalf of the United States for the protection of the general public interest.

ANALYSIS OF THE QUESTION

The milk licenses provide that licensees shall make reports to the Market Administrators concerning the quantity of milk delivered to them by producers, and furnish information concerning the milk sold, used and distributed by them. Similarly, the licenses for fruits and vegetables require licensees to make reports to the Control

Committees as to the quantity and quality of fruit handled, shipped etc. Moreover, the licensees, by the terms of the various licenses, are obligated to furnish information necessary to enable a Market Administrator or a Control Committee to investigate violations and to ascertain whether the policies and purposes of the licenses and the Agricultural Adjustment Act are being effectuated. The licenses, however, fail to make any provision for the enforcement of the obligations thus imposed. Thus, the effectiveness of such a provision need not be here considered. However, it might be noted that a forceful argument can be made in support of the validity of a license provision granting to a Market Administrator or a Control Committee a right to bring an action to compel licensees to make reports and furnish information. The Agricultural Adjustment Act, by Section 8 (3), authorizes the Secretary of Agriculture to issue licenses subject to terms and conditions necessary to eliminate unfair practices and charges that prevent or tend to prevent the declared policy of the Act. If the requiring of licensees to make reports and furnish information to a Market Administrator or a Control Committee is a valid term or condition, a license provision granting power to enforce these obligations would likewise appear valid. Such a license provision would apparently have the force and effect of a statutory authorization. The narrow question here considered is whether, apart from authorization in a license, a Market Administrator or a Control Committee, as the case may be, is entitled to bring an action to enforce the obligations due to them under the terms of the various licenses.

Initially, an examination of Section 8 a (6) of the Agricultural Adjustment Act will be made to ascertain whether it confers on the district courts of the United States jurisdiction to enforce license provisions upon suits brought by a Market Administrator or a Control Committee. If upon this examination a negative conclusion is reached, consideration will be given to the right of such agencies to bring actions independently of statutory authorization. To establish this right it will be necessary to show: (a) that the remedies provided for in Sections 8 a (6) and 8 a (7), 8 (3), and 10 (h) of the Agricultural Adjustment Act are not exclusive of an action by a Market Administrator or Control Committee to compel licensees to make reports and furnish information, (b) that a court of equity has jurisdiction to compel performance of the licensees' obligations to make reports and furnish information upon a suit by a Market Administrator or a Control Committee, (c) that the failure of the Agricultural Adjustment Act and the licenses issued pursuant thereto to authorize suit by a Market Administrator or a Control Committee does not negative the right of these governmental agencies to bring suit.

- I. Section 8a (6) of the Agricultural Adjustment Act does not authorize an action by a Market Administrator or a Control Committee to enforce the obligation of licensees to make reports and furnish information.

Section 8 a (6) of the Agricultural Adjustment Act provided:

"The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating, the provisions of this section, or of any order, regulation, agreement, or license heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts."

This section considered alone might be construed to authorize a Market Administrator or a Control Committee to bring an action to enforce the obligations imposed upon licensees by the terms of the licenses. This section, should be considered, however, in connection with Section 8 a (7) which provides:

"Upon the request of the Secretary of Agriculture, it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to, this title."

Whether Section 8 a (7) is to be considered as a limitation upon the prior Section 8 a (6) is a matter not entirely free from doubt. However, it reasonably appears that the two sections contemplate an action by the several district attorneys acting under the direction of the Attorney General. Lending color to this interpretation is that part of Section 10 (h) of the Act which provides:

"The Secretary may report any violation of any agreement entered into under Part 2 of this title to the Attorney General of the United States who shall cause appropriate proceedings to enforce such agreements to be commenced and prosecuted in the proper courts of the United States without delay."

Thus throughout Title I of the Agricultural Adjustment Act, it seems to have been intended that proceedings to enforce licenses or agreements should be brought under the direction of the Attorney General of the United States.

Although the legislative history of Sections 8 a (6) and 8 a (7) of the Act does not aid in the construction of these sections, the interpretation placed by the courts on a somewhat similar statutory provision is persuasive to the effect that Section 8 a (6) does not authorize a suit by a Market Administrator or a Control Committee. Thus, Section 4 of the Sherman Anti-Trust Act (United States Code, Title 15, Section 4) provides in part:

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7, inclusive, or section 15 of this chapter; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."

This section has been construed to deny the right of a private person to sue to restrain or prevent a violation of the Sherman Act even though the person seeking relief was threatened with a special injury by reason of the unlawful combination. Paine Lumber Co. v. Neal, 244 U.S. 459 (1916). Section 4 of the Sherman Act, therefore, not only does not confer rights on any parties except the district attorneys of the United States, acting under the direction of the Attorney General, but apparently has the effect of limiting rights existing apart from the provision. A party threatened with special injury by a violation of a law of the United States would seem to have a right to bring a suit for an injunction in a federal court inasmuch as the action is one arising under a law of the United States of which a federal court has jurisdiction regardless of the citizenship of the parties. See Mannington v. Hocking Valley R.R.Co., 183 Fed. 133 (1910).

Since it does not appear that the Agricultural Adjustment Act authorizes a suit by a Market Administrator or a Control Committee to enforce the license obligations, consideration will be given to the right of a Market Administrator or a Control Committee to bring such an action independent of statutory authorization. As pointed out supra, this necessitates an initial investigation as to whether Sections 8 a (6) and 8 a (7), 8 (3), and 10 (h) of the Agricultural Adjustment Act set forth remedies exclusive of an action by a Market Administrator or a Control Committee.

- II. The remedies provided by section 8 a (6) and 8 a (7), and 8 (3) of the Agricultural Adjustment Act do not exclude an action by a Market Administrator or a Control Committee to enforce the obligations imposed by a license; however, Section 10 (h) of the Act does furnish an exclusive remedy as to reports and information sought in connection with investigation of license violations.

Sections 8 (a) (6) and 8 a (7) of the Agricultural Adjustment Act provide for suits by the several district attorneys of the United States, under the direction of the Attorney General, to prevent and restrain any person from violating the terms of the licenses issued pursuant to the Agricultural Adjustment Act. Section 8 (3) of the Act provides that the Secretary of Agriculture may suspend or revoke a license in the event of the failure of a licensee to comply with the terms and conditions thereof. Section 10 (h) of the Act provides that Sections 8, 9, and 10 of the Federal Trade Commission Act are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of the Act and to any person subject to the provisions of the Act, whether or not a corporation. All of the above cited sections of the Act thus provide for remedies where licensees fail to make reports and furnish information required under the terms of a license. However, the cited sections do not empower a Market Administrator or a Control Committee to enforce the remedies provided for therein. Therefore, if such remedies are exclusive, a Market Administrator or a Control Committee has no power to sue to enforce the obligations of licensees to make reports and furnish information. Consideration will, therefore, be directed to Sections 8 a (6) and 8 a (7), 8 (3), and 10 (h) of the Act in an attempt to ascertain whether the remedies provided therein are exclusive and therefore a bar to an action by a Market Administrator or a Control Committee:

- (a) Sections 8 a (6) and 8 a (7) of the Act are not a bar to an action by a Market Administrator or Control Committee.

That Sections 8 a (6) and 8 a (7) of the Act are not a bar to an action by a Market Administrator or a Control Committee to enforce the obligations of licensees to make reports and to furnish information is clear since Section 8 a (8) of the Act specifically provides:

"The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity." (Underscoring supplied)

Since Section 8 a (8) refers only to the remedies provided for in Section 8 a of the Act, the question whether Sections 8 (3) and 10 (b) of the Act provide exclusive remedies remains for consideration.

- (b) Section 8 (3) of the Act is not exclusive of an action by a Market Administrator or a Control Committee.

Section 8 (3) provides:

"The Secretary of Agriculture may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. * * * Any such person engaged in such handling without a license as required by the Secretary under this section shall be subject to a fine of not more than \$1,000 for each day during which the violation continues."

It is a well-established principle that where a statute creates a new right and the mode in which it is to be enforced is specifically provided, such a remedy is exclusive, United States v. Southern Dredging Company, 251 Fed. 400 (1918); Cosmopolitan Trust Co. v. Cohen, 244 Mass. 128, 138 N.E. 711 (1923); In re Mang 227 N. Y. 264, 125 N. E. 508 (1919). There is, however, an exception to this recognized general rule. Thus, if the statutory remedy is inadequate or ineffectual to carry out the purposes of the statute, it is generally held that the remedy provided is not to be deemed exclusive. United States v. Chamberlin, 219 U. S. 230 (1910); Loisel v. Mortimer, 277 Fed. 882 (1922); Miller v. Johnson, 110 Kan. 135, 202 Pac. 619 (1921); Pinnacle Gold Mining Co. v. People, 168 Calif. 86, 143 Pac. 837 (1914); People v. Stafford Packing Co., 193 Calif. 719, 227 Pac. 485 (1924).

In the Stafford Packing Co. case, a California statute required fish hatcheries to secure permits from the Board of Fish and Game Commissioners before using fish in their reduction plants. The statute further conferred power upon the Board, after a hearing, to suspend the license of a packer found guilty of violating the terms of the permit. An injunction was sought to restrain a packer from violating his permit by using more fish than was permitted him under the terms of his license. The defendant raised the defense that the administrative remedy provided by the statute was exclusive. After reviewing the administrative procedure thus required by the statute before an order to suspend the license could be entered, the court in granting the injunction stated:

"It is thus apparent that a resourceful defendant may delay the proceedings of a hearing before the Commissioners, indefinitely. In the meantime, the defendant may continue the wasteful destruction of fish at the rate of millions per month. If it is finally found guilty by the Commission the utmost penalty which the latter can impose is a suspension of license not exceeding ninety days. In the meantime the fishing season for that part of the country will probably have ended, and the

ninety days suspension of license would be inconsequential. If not, as suggested by counsel for the Commission, the defendant may then lease his plant to some other person who may continue the operation thereof. We are satisfied that the conclusion of the trial judge that the remedy thus afforded is not adequate cannot and should not be disturbed by us."

In United States v. Calistan Packers, Inc., 4 Fed. Supp. 660 (1933) a bill was filed by the Government to enjoin the defendant from canning and selling cling peaches in excess of such quantity as fixed by a license granted under provisions of Section 8 (3) of the Agricultural Adjustment Act. The court held that the Administrative remedy of a license revocation followed by a prosecution for the collection of the statutory fine would be inadequate for the reason that the canning season would be over before the proceedings for the revocation of the license could be concluded and therefore the statutory remedy was not to be considered exclusive of an action for an injunction.

In each of the above cases the court held that the administrative remedy provided by the statute should not be deemed exclusive of other remedies. It is true that the facts in the Stafford Packing Co. case and the Calistan case showed a clear necessity for an immediate relief. It is, however, believed that such a need for an immediate relief usually can be shown where an action is brought to enforce the obligation of licensees to make reports and furnish information. The effective execution of the milk licenses is absolutely dependent upon the making of prompt reports by the licensees of their total purchases and sales. Without such reports the Market Administrator is unable to compute the blended price which is the foundation upon which rests the entire milk marketing plan. Likewise, it can usually be shown that the execution of the various licenses for fruits and vegetables necessitates a making of prompt reports by the licensees. Since a license may be revoked only after due notice and opportunity for hearing, the obtaining of such reports within the necessary time will be impossible unless an immediate action to enforce the obligation of a party to make the reports is available.

- (c) Section 10 (h) of the Act making certain provisions of the Federal Trade Commission Act applicable to the jurisdiction, powers, and duties of the Secretary bars an action by a Market Administrator or a Control Committee as to reports and information sought in connection with investigation of license violations.

Section 10 (h) of the Agricultural Adjustment Act provides:

"For the efficient administration of the provisions of part 2 of this title, the provisions, including penalties, of sections 8, 9 and 10 of the Federal Trade Commission Act, approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this title and to any person subject to the provisions of this title, whether or not a corporation."

The Sections 8, 9 and 10 of the Federal Trade Commission Act, in brief, provide that the Commission shall have access to the records of a corporation being investigated or proceeded against and a right to the production of documents in certain instances. Section 9 of the Federal Trade Commission Act further provides:

"Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this subdivision of this chapter or any order of the commission made in pursuance thereof."

The courts in interpreting the Federal Trade Commission Act have placed strict limitations on its applicability and have declared that demand for access to records or production of documents may be made only in connection with an investigation or a court action. Federal Trade Commission v. Baltimore Grain Co. 284 Fed. 886 (1922), affirmed in Federal Trade Commission v. Hammond, Snyder and Co., 267 U.S. 586 (1925); Federal Trade Commission v. P. Lorillard Co. 283 F. 999 (1922), affirmed Federal Trade Commission v. American Tobacco Co., 264 U.S. 298 (1924). That is, the demand for access to records or their production must be made "on the basis of some facts tending to establish a charge of wrong doing." Federal Trade Commission v. P. Lorillard Co., *supra*. Since the reports and information which under the terms of the various licenses, the licensees are to furnish to a Market Administrator or to a Control Committee ordinarily do not relate to investigations, Section 10 (h) of the Act usually provides no remedy where licensees fail to furnish reports and information. However, with regard to reports and information sought in connection with investigations of license violations, Section 10 (h) apparently furnishes an exclusive remedy. The case of Federal Trade Commission v. Claire Furnace Co., 274 U. S. 160 (1927), holding that it is within the sole discretion of the Attorney-General whether an action of mandamus will be

brought under the authorization of Section 9 of the Federal Trade Commission Act to compel parties to produce reports and information, supports the view that Section 10 (h) provides an exclusive remedy. This is true since if the remedy were not exclusive, it would be possible for parties other than the Attorney General to have discretion as to the bringing of an action to compel production of the reports and information.

III. A Market Administrator or a Control Committee may not bring an action in equity to enforce the obligations imposed by the licenses, since there is no basis for equity jurisdiction in such a suit.

An action by a Market Administrator or a Control Committee to enforce license-imposed obligations must be in a court of equity. Equitable relief can be obtained only if there is a basis for equity jurisdiction. Inasmuch as the Agricultural Adjustment Act contains no provision conferring jurisdiction on courts to enforce license at the behest of a Market Administrator or a Control Committee, jurisdiction must be grounded on general equitable principles. Independently of statutory authorization, equity usually protects property rights only. Re Sawyer, 124 U.S. 200 (1888); Moore v. New York Cotton Exch., 296 F. 61 (1923); In re Debs, 158 U. S. 564 (1895). Whether a Market Administrator or a Control Committee could establish a sufficient property interest is questionable. However, apart from statutory authorization, courts of equity assume jurisdiction to protect the interest of the general public when the occasion arises. In re Debs. supra; United States v. American Bell Telephone Co., 128 U. S. 315 (1888). It might therefore be argued that the Agricultural Adjustment Act and the licenses issued pursuant thereto involve a matter of such public interest that a court of equity should assume jurisdiction to enforce the obligations imposed thereby. But the rule that the Attorney General is the only proper party to enforce the public right is well recognized. United States v. San Jacinto Tin Co., 125 U. S. 273 (1888); cf. In re Debs. supra.

Even if a property interest on the part of the Market Administrator or Control Committee could be shown, the recent case of North Dakota-Montana W. G. Ass'n. v. U. S., 66 F., (2d) 573 (1933) indicates that, unless express statutory authority for suit by an unincorporated agency of the government is given, the suit should be brought in the name of the United States and under the direction of the Attorney General. That case involved an action in equity brought by the United States to foreclose a real estate mortgage upon certain property given by the appellant to secure the payment of a \$25,000.00 loan

made to the appellant by the Federal Farm Board from the revolving fund provided by the Agricultural Marketing Act (7 U.S.C.A. Sections 521-573). The appellant relied upon the defense that the Federal Farm Board was the proper party to bring the action. The court in rejecting this contention declared that the Farm Board was merely an unincorporated agency of the Government to carry out the purposes of the Agricultural Marketing Act and that if it were intended that such agency should have the power to sue and be sued, that power would have been expressly conferred. The court therefore reasons that where the power was not thus granted it was to be inferred that Congress intended that the United States rather than the Government agency should sue and be sued. In holding that the Federal Farm Board was not the proper party to sue the court expressly stated: "We are satisfied the Farm Board could not have brought suit to recover the moneys loaned to the defendant." Although under the facts of the particular case the mortgage ran to the United States and not to the Federal Farm Board, it is clear from the language of the case that this fact did not influence the court in its decision. Therefore, the fact that under the licenses the reports and information are to be furnished directly to a Market Administrator or a Control Committee does not serve to take the case arising under the licenses out of the rule applied in the North Dakota-Montana W.G. Ass'n. case.

CONCLUSION

Although it is believed that except where the reports and information are sought in connection with license violations, the possible argument that the remedies provided in the Agricultural Adjustment Act are exclusive can be successfully disposed of, yet the case of North Dakota-Montana W.G. Ass'n v. U.S., *supra*, casts serious doubt on the right of unincorporated governmental agencies to bring suit unless this power is expressly granted by statute. And finally, even though the above-mentioned difficulties are found not to be insurmountable, there would be no basis for equitable jurisdiction where suit is brought by a Market Administrator or a Control Committee, because it is well settled that suits to protect the public interest should be brought by the Attorney General. For these reasons, I am of the opinion that neither a Market Administrator nor a Control Committee may bring an action to compel licensees to make reports and furnish information.

Telford Taylor,
Acting Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 103

STORAGE CHARGES ON EXPORT WHEAT

The Secretary of Agriculture is not obligated to pay the storage charges which have accrued against the North Pacific Emergency Export Association or against the members of the Association upon wheat purchased as provided for in Exhibit A of the Marketing Agreement for the Disposal of the North Pacific Wheat Surplus, which has been tied up due to strike conditions on the Pacific Coast.

(See also Opinion No. 53 (Opinion Section Memorandum No. 100))

Opinion Section Memorandum No. 148
Dated August 2, 1934.

August 2, 1934.

MEMORANDUM TO MR. THEIS

Pursuant to your request, I submit herewith an opinion upon questions arising under the following facts:

STATEMENT OF FACTS

The North Pacific Emergency Export Association, pursuant to the Marketing Agreement for Disposal of North Pacific Wheat Surplus, has purchased wheat for sale in the export trade. The wheat has been purchased, as provided for in Exhibit A of the marketing agreement, on the basis No. 1 Federal Grades, sacked, delivered on track at tidewater terminal markets. The contracts for the purchase of the wheat specifically provide that the "price paid in the country for wheat covered by this contract is the full association quoted price, as in effect on date of purchase, less only established trade charges to convert wheat from country basis to basis No. 1 Sacked Track, Tidewater Terminal." Due to the strike conditions on the Pacific Coast, it has been impossible for the Association to transport the purchased wheat into the tidewater terminal markets. Storage charges have thus accrued against the association. That the storage charges in the country are against the Association rather than the seller is clear since the purchase contracts expressly provide for delivery "21 days buyers' option" with the "carrying charges to accrue to benefit of seller on basis of 1/30 cent per bushel per day after expiration of option." However, the Marketing Agreement for Disposal of North Pacific Wheat Surplus does not make any provision concerning whether the Secretary is liable for the storage charges thus occurring against the Association (or against the members of the Association,

where the Association has assigned the purchase contracts to them). Under this factual situation the following questions arise:

QUESTION

1. Is the Secretary of Agriculture obligated to pay the storage charges in the country which have accrued against the Association on wheat which it has purchased under the marketing agreement pursuant to the direction of the Secretary of Agriculture, or his agent, and which it is unable to bill to the terminal market elevators because of strike conditions?

2. Is the Secretary obligated to pay the storage charges which have accrued against members of the Association on wheat covered by the purchase contracts which the Association has assigned to them?

OPINION

The Secretary of Agriculture is not obligated to pay the storage charges which have accrued against the Association or the members of the Association.

DISCUSSION

The problem is similar to that presented in Opinion No. 100 in connection with demurrage charges, and the ruling of the Comptroller General on the "demurrage question" will be decisive not only of the Secretary's obligation to pay the storage charges but also of his power to assume responsibility for the payment thereof.

1. The Secretary of Agriculture is not obligated under the marketing agreement to pay the storage charges which have accrued against the Association or the members thereof.

The Marketing Agreement for the Disposal of North Pacific Wheat Surplus in Section 4 provides that the Secretary of Agriculture may instruct the Association to purchase wheat on the basis set forth in Exhibit A of the marketing agreement. The Association, with respect to the wheat thus purchased, may, under Section 5 of the marketing agreement, sell the wheat directly in the export trade or may allow members of the Association to purchase the wheat from

the Association with the members making the sales in the export trade. The Secretary agrees in Section 8 of the marketing agreement to pay to the Association an amount equal to the difference between the purchase price of the wheat and the net sales price. With respect to the money paid to the Association, Section 9 provides that (a) the Association shall reimburse itself for the cost which has been incurred (in accordance with the schedule set forth in Exhibit B) over and above the purchase price prior to the transfer of the wheat contracts to the members of the Association, and (b) the Association shall pay to those members to whom the contracted wheat has been transferred by the Association an amount equal to the difference between the purchase price which such members have been paid for the contracted wheat and the net sales price received in connection with the sale of such wheat in the form of wheat or flour. Exhibits A, and B of the marketing agreement, in providing for the discounts to be allowed in ascertaining the purchase price and the net sales price, make no provision for storage charges in the country. The marketing agreement does not state who is to be liable for the item of storage charges.

It has been urged that the Secretary of Agriculture is obligated to pay the storage charges on the ground that it was not contemplated that the Association or its members should incur any deficit chargeable to them in the performance of their functions under the terms of the marketing agreement and that if the Secretary does not make payment of the storage charges, the Association and its members will lose money. That the end sought by the Secretary and the parties to the marketing agreement in entering into the marketing agreement is an important factor to be considered in construing the marketing agreement is undeniable.

On the other hand, Sections 8 and 9, of the marketing agreement considered together with the Exhibits A, B, and C, minutely set forth the payments to be made by the Secretary of Agriculture. For example, Exhibit B provides:

"The following schedule of terms and amounts is to be allowed in the cost of handling wheat and is to be deducted from the sales price to determine the net sales price.

- f. Carrying charges beginning 20 days after delivery in tidewater terminal elevators, $1/30$ of a cent per bushel per day until loaded f.o.b. steamer."

I am of the opinion that the provisions in the Exhibits are exclusive and that changes therein or additions thereto are to be made in the manner set forth in Section 7 of the marketing agreement. Although it seems undeniable that if the possibility of strike

conditions had been thought of at the time the marketing agreement was formulated, a provision for storage charges would have been made, this is not a sufficient basis on which to predicate the Secretary's liability for the payment of the storage charges. I must accordingly advise against the Secretary's making such expenditures in the absence of a ruling by the Comptroller-General sustaining the Secretary's authority to do so.

2. The ruling of the Comptroller-General on the "demurrage question" will govern not only the obligation of the Secretary to pay the storage charges, but also his power to assume liability for the payment of the charges.

A previous memorandum (Opin. No. 100) has dealt with the obligation of the Secretary of Agriculture to pay demurrage charges and his power to assume responsibility for payment in the absence of such obligation. The marketing agreement makes no provision relative to the payment of either the demurrage charges or the storage charges, both having accrued by reason of unexpected strike conditions. The legal problems arising in connection with the two charges appear to be similar, and, therefore, the question of the power of the Secretary to assume the obligation to pay the storage charges will not be further considered here. I am of the opinion that the ruling of the Comptroller-General on the "demurrage question", which has been presented to him, will be decisive of the obligation of the Secretary of Agriculture to pay the storage charges and of his power to assume responsibility for the payment of the charges.

Telford Taylor,
Acting Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 104

ADVANCES FOR EXPENSES OF MARKET

ADMINISTRATOR

In connection with a milk license which provides that a Market Administrator may borrow money to meet his costs of operation until such time as payments are made to him pursuant to the provisions in the license, the Secretary may make necessary advances to the Market Administrator, provided, however, that the service or goods for which expenses are incurred have already been rendered.

August 2, 1934.

MEMORANDUM TO MR. PRESSMAN

Pursuant to your request, I submit herewith an opinion upon the following:

QUESTION

The form milk license provides that a Market Administrator may borrow money to meet his costs of operation until such time that the first payments are made to him pursuant to the provisions in the license. May the Administration make the necessary advance to the Market Administrator pending the receipt of such funds to repay the same?

OPINION

The Secretary of Agriculture may make necessary advances to the Market Administrator provided, however, that the services or goods for which the expenses are incurred have already been rendered.

DISCUSSION

The sections of the Agricultural Adjustment Act authorizing the appointment of Market Administrators and providing for payment by the Secretary of Agriculture of administrative expenses of governmental agencies set up under the Act empower the Secretary to loan money to Market Administrators to meet administrative expenses.

Section 10 (a) of the Agricultural Adjustment Act provides:

"The Secretary of Agriculture may appoint such officers and employees, subject to the provisions of the Classification Act of 1923 and Acts amendatory thereof, and such experts as are necessary to execute the functions vested in him by this title; * * *"

Pursuant to the above quoted section and section 8(3) of the Act, giving power to the Secretary of Agriculture to issue licenses, the Secretary has appointed Market Administrators as his agents to administer the various milk licenses. The Agricultural Adjustment Act further makes provision for the payment of administrative expenses incurred by the agencies set up thereunder. Section 12 of the Act, dealing with appropriations, includes the following provisions:

"(a) There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for rental and benefit payments made with respect to reduction in acreage or reduction in production for market under part 2 of this title. Such sum shall remain available until expended.

"(b) In addition to the foregoing, the proceeds derived from all taxes imposed under this title are hereby appropriated to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the following purposes under part 2 of this title: Administrative expenses, rental and benefit payments, and refunds on taxes. * * *

"(c) The administrative expenses provided for under this section shall include, among others, expenditures for personal services and rent in the District of Columbia and elsewhere, for law books and books of reference, for contract stenographic reporting services, and for printing and paper in addition to allotments under the existing law. The Secretary of Agriculture shall transfer to the Treasury Department, and is authorized to transfer to other agencies, out of funds available for administrative expenses under this title, such sums as are required to pay administrative expenses incurred and refunds made by such department or agencies in the administration of this title."

That the Secretary of Agriculture possesses the power to pay the salaries of and the administrative expenses incurred by the Market Administrators under the terms of the milk licenses appears clear from a consideration of the above-mentioned sections of the Act. The fact that the Secretary has adopted another plan for ultimately meeting the administrative expenses incurred under the licenses, by assessments levied on licenses, does not derogate from the Secretary's power to pay the administrative expenses from the appropriations.

The power of the Secretary to pay the administrative expenses would appear to include the lesser power to make loans to the Market Administrators to cover costs of operation until funds can be obtained from the assessments levied under the license. Moreover, it should be noted that section 12 (a) and (b) provide that the \$100,000,000 and the proceeds from the processing taxes shall be "available" for administrative expenses. It seems entirely permissible to construe this as meaning that the funds shall be available for loans to meet administrative expenses as well as available for payment of administrative expenses.

Neither the provisions of the United States statutes nor judicial decisions involving the disposition of public moneys seem to prevent this construction being placed upon the power of the Secretary under the Act. The case of The Floyd Acceptances, 74 U. S. 666 (1868) might be thought to limit the power of the Secretary to advance the moneys necessary to meet the initial costs under the milk licenses, but I am of the opinion that it is not applicable to the present facts. In the Floyd case, Russell & Co. had contracts for supplies and transportation to be furnished to the United States Army in Utah. The performance of these contracts required a very large outlay of money, and the company finding it difficult to advance this money and wait for its return until it was entitled to receive payment under the contracts, made an arrangement with the Secretary of War under which the company should draw time drafts on him, payable to its own order, to the Bank of ^{the} Republic in New York, which should be accepted by the Secretary. On these drafts the company was then to raise the money necessary to enable it to perform its contracts and as the money for the transportation and supplies became due, the company was to receive it and take up the acceptances of the Secretary before or at maturity. Under this arrangement the Secretary accepted drafts to the amount of \$5,000,000., most of which were taken up by the company, as agreed, but over \$1,000,000 in amount remained unpaid. The drafts on the latter sum passed into the hands of various bona fide purchasers who brought action against the United States on the bills. The court in refusing to allow the claim of the plaintiffs declared that the transaction amounted, in effect, to a loan of the credit of the Government volunteered by the Secretary of War, without consideration and without authority. The court stated at page 681:

"It seems to us that such a transaction can be defended on no principle of law, and that, in thus lending to Russell & Co. the name and credit of the United States, the secretary was acting wholly beyond the scope of his authority. The paper was, in fact, accommodation paper; as it was found to be by the Court of Claims, by which the secretary undertook to make the United States acceptor for the sole benefit of the drawers. It was a loan of the credit of the government volunteered by him, without consideration and without authority.

That the transaction was not payment, nor intended to be payment, for the supplies furnished, is clear, because the acceptances were not expected to be paid by the government, nor payable at the treasury, but were to be met by the drawers at the bank with which they dealt. These drafts did not interrupt in the least the regular payments made to Russell & Co. by the Quartermaster's Department, according to their contracts. Nor do the drafts seem to have had any relation to anything due on these contracts, or to what might become due before their maturity. It was, therefore, not payment, nor so considered by either party."

In the Floyd case, the Secretary of War had no power to make any payment to the company at the time the loan was made, since nothing was then due under the contracts. Under the instant facts, the Secretary of Agriculture, as pointed out above, has the power to pay to the Market Administrators administrative costs which, as postulated in this opinion, have already been incurred by them. The Floyd case is applicable only if the Secretary attempts to loan money to the Market Administrator before the administrative expenses under the licenses have been incurred. That the Secretary may not make advances of payments to Market Administrators is clear from section 529 of Title 31, of the United States Code which provides:

"Except as otherwise provided by law, no advance of public money shall be made in any case. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. It shall, however, be lawful, under the special direction of the President, to make such advances to the disbursing officers of the Government as may be necessary to the faithful and prompt discharge of their respective duties, and to the fulfillment of the public engagements. The President may also direct such advances as he may deem necessary and proper, to persons in the military and naval service employed on distant stations, where the discharge of the pay and emoluments to which they may be entitled cannot be regularly effected. (R. S. § 3648)"

The prohibition against payments in advance of the time when the obligation to pay has accrued would include a prohibition against loans, in lieu of outright payments, which are made before the obligations to meet ^{which} the loans are made, have accrued. If, however, the Secretary merely seeks to loan money to Market Administrators

to pay costs of operation which have already accrued, I am of the opinion that the Secretary possesses this power, such power being implied from the provisions of the Agricultural Adjustment Act conferring on him the power to pay the administrative expenses of the agencies set up under the Act.

Since the Comptroller-General has not heretofore had presented to him the question whether the power to pay money for designated purposes includes the power to loan money for the same purposes, I am unable to advise you definitely that the Secretary can loan the money to the Market Administrator to meet accrued administrative expenses. Therefore, although I am of the opinion that the conclusions herein set forth are sound, it may be advisable, as a precautionary measure, to obtain a ruling from the Comptroller-General.

Telford Taylor,
Acting Chief, Brief and Opinion Section,
Office of General Counsel.

No. 105

EMPLOYMENT OF SPECIAL ATTORNEYS BY
AGRICULTURAL ADJUSTMENT ADMINISTRATION

An attorney accepting a special position with the Agricultural Adjustment Administration in connection with specific legal matters is neither an officer nor an employee of the United States and is therefore not subject to Section 99, 5 U.S.C.A., or to Section 203, 18 U.S.C.A.

Such attorney may be a person holding a "place of trust or profit," within the terms of Section 198, 18 U.S.C.A., but if he does not personally assist in the prosecution of a claim against the United States, he may share partnership profits arising from the prosecution of such a claim by another member of his firm.

August 2, 1934.

MEMORANDUM TO MR. PRESSMAN

Pursuant to your inquiry of June 29th I reply as follows:

QUESTION I

Are the Federal Statutes dealing with the right of a public official to represent persons in claims against the United States applicable to an attorney accepting a special position with the Agricultural Adjustment Administration in connection with a specific job?

REPLY

Since such an attorney is neither an officer nor an employee of the United States he is not subject to Section 99 of Title 5 nor to Section 203 of Title 18 of the U.S.C.A. He may be held to be a person holding a "place of trust or profit" within the terms of Section 198 of Title 18, but if he does not personally assist in the prosecution of a claim against the United States he may share partnership profits arising from the prosecution of such a claim by another member of his firm.

DISCUSSION

The Federal statutes relevant to the instant question are the following:

Title 5 - U. S. Code

"Sec. 99. Ex-officers or employees not to prosecute claims in departments. It shall not be lawful for any person appointed as an officer, clerk, or employee in any of the departments, to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said departments while he was such officer, clerk, or employee, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk or employee. (R. S. § 190.)"

Title 18 - U. S. Code

"Sec. 203. (Criminal Code, section 113)
Receiving pay by Member of Congress in matters
affecting United States. Whoever, being elected
or appointed a Senator, Member of or Delegate to
Congress, or a Resident Commissioner, shall, after
his election or appointment and either before or
after he has qualified, and during his continuance
in office, or being the head of a department, or
other officer or clerk in the employ of the United
States, shall, directly or indirectly, receive,
or agree to receive, any compensation whatever for
any services rendered or to be rendered to any per-
son, either by himself or another, in relation to
any proceeding, contract, claim, controversy,
charge, accusation, arrest, or other matter or
thing in which the United States is a party or
directly or indirectly interested, before any de-
partment, court-martial, bureau, officer, or any
civil, military, or naval commission whatever,
shall be fined not more than \$10,000 and imprison-
ed not more than two years; and shall moreover,
thereafter be incapable of holding any office of
honor, trust, or profit under the Government of
the United States. (R.S. § 1782; Mar. 4, 1909,
c. 321, § 113, 35 Stat. 1109)" (*Italics supplied*)

Title 18 - U. S. Code

"Sec. 198. (Criminal Code, section 109)
Officers interested in claims against United States.
Whoever, being an officer of the United States, or a
person holding any place of trust or profit, or dis-
charging any official function under, or in connec-
tion with, any executive department of the Government
of the United States, or under the Senate or House
of Representatives of the United States, shall act
as an agent or attorney for prosecuting any claim a-
gainst the United States, or in any manner, or by any
means, otherwise than in discharge of his proper offi-
cial duties, shall aid or assist in the prosecution
or support of any such claim, or receive any gratuity
or any share of or interest in any claim from any
claimant against the United States, with intent to
aid or assist, or in consideration of having aided
or assisted, in the prosecution of such claim, shall
be fined not more than \$5,000, or imprisoned not more
than one year, or both. Members of the National
Guard of the District of Columbia who receive com-
pensation for their services as such shall not be
held or construed to be officers of the United States,
or persons holding any place of trust or profit, or

discharging any official function under or in connection with any executive department of the Government of the United States within the provision of this section. (R.S. § 5498; Mar. 1, 1901, c. 670, § 1, 31 Stat. 844; Mar. 4, 1909, c. 321, § 109, 35 Stat. 1107)"

Special attorneys on a per diem basis are subject while acting in that capacity to neither Section 99 of Title 5 nor to Section 203 of Title 18 of the U.S.C.A., since they are neither officers, clerks nor employees of the United States, but are merely contractors for personal services.

That a special attorney on a per diem basis is not an officer within the meaning of these statutes may readily be seen from a comparison of the established indicia of office with the status of such attorneys.

In United States v. Hartwell, 73 U.S. 385 (1867), where a clerk in the office of the Assistant Treasurer of the United States was held guilty of embezzlement as an official, the court thus enumerated the characteristics of public office:

"An office is a public station or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties * * * He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional and temporary. * * * The defendant was appointed by the head of a department within the meaning of the constitutional provision upon the subject of the appointing power." (pp. 393-4)

The following additional criteria of public office were indicated in United States v. Germaine, 99 U.S. 508 (1878) (Held that civil surgeons are not "officers of the United States" within a criminal statute):

"He is required to keep no place of business for the public use. He gives no bond and takes no oath. * * * No regular appropriation is made to pay him compensation. * * * He is but an agent of the Commissioner, appointed by him, and removable by him at his pleasure * * * He may appoint one or a dozen persons to do the same thing. The compensation may amount to five dollars or five hundred dollars per annum. There is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case." (p. 512).

See also Metcalfe & Eddy v. Mitchell, 269 U.S. 514 (1925); United States

v. Mouat, 124 U. S. 303 (1888); United States v. Maurice, 2 Brock, 96, Fed. Cas. No. 15,747 (1823); Hall v. Wisconsin, 103 U.S. 5 (1880).

It is plain that neither the tenure, mode of compensation, method of appointment nor duties of a special attorney on a per diem basis conform to any of the elements of public office set out in these cases.

The notice of appointment of special attorneys is worded as follows:

"You are hereby notified that you have been appointed in the position of Special Attorney in the Agricultural Adjustment Administration at a salary of _____ per diem, effective _____, and to continue for a period of not to exceed _____ working days."

Such an appointment may be made by the Secretary under Section 12 of the Agricultural Adjustment Act which, in subdivision (c) contains an appropriation for administrative expenses providing that:

"The administrative expenses provided for under this section shall include among others, expenditures for personal services and rent * * * "

Under this Section the Secretary may contract for services without appointing such person an officer or employee of the Agricultural Adjustment Administration. This method of engaging attorneys is obviously not in conformity with any of the means of designating "officers of the United States" laid down in Article II, Section 2 of the Constitution, which reads as follows: (The President)

" * * * Shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may, by Law, vest the Appointment of such inferior Officers, as they may think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Since the services of special attorneys may be acquired pursuant to a general appropriation act, they are not rendered in connection with an office established by law. Moreover, the instant situation is clearly governed by the rule that a relation arising out of a contract and dependent for its duration and extent upon the terms thereof is never considered an office. Shelby v. Alcorn, 36 Miss. 273, 72 Am. Dec. 189 (1858). Special attorneys have a tenure which is occasional and temporary, not continuing and permanent; their duties and compensation are bounded by the terms of contracts entered into for specific objects. Compensation is received by such attorneys only when they are actually employed. Special attorneys so appointed perform designated functions, such as handling

discharging any official function under or in connection with any executive department of the Government of the United States within the provision of this section. (R.S. § 5498; Mar. 1, 1901, c. 670, § 1, 31, Stat. 844; Mar. 4, 1909, c. 321, § 109, 35 Stat. 1107)"

Special attorneys on a per diem basis are subject while acting in that capacity to neither Section 99 of Title 5 nor to Section 203 of Title 18 of the U.S.C.A., since they are neither officers, clerks nor employees of the United States, but are merely contractors for personal services.

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" * * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may, by Law, vest the Appointment of such inferior Officers, as they may think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Since the services of special attorneys may be acquired pursuant to a general appropriation act, they are not rendered in connection with an office established by law. Moreover, the instant situation is clearly governed by the rule that a relation arising out of a contract and dependent for its duration and extent upon the terms thereof is never considered an office. Shelby v. Alcorn, 36 Miss. 273, 72 Am. Dec. 189 (1858). Special attorneys have a tenure which is occasional and temporary, not continuing and permanent; their duties and compensation are bounded by the terms of contracts entered into for specific objects. Compensation is received by such attorneys only when they are actually employed. Special attorneys so appointed perform designated functions, such as handling

a particular case, working on a particular problem, or serving on a particular committee; their work is not subject to the supervision or control of any official of the Department; at all times when not actually needed for such duties, they carry on their private business, do not participate in any way in the business of the Administration and do not report for duty unless especially requested to do so. Such attorneys act only when called on by the Secretary and only in some particular case; they may be engaged in several suits during a year or in none; they give no bond and no regular appropriation is made to pay their compensation. The Secretary may engage one or a dozen special attorneys according to his needs and their compensation may vary widely one from the other; there is no penalty for their absence from duty or refusal to perform, except the loss of their fees in the given case.

The only characteristic shared by per diem attorneys and officers, as described in the cases cited above is that special attorneys designated by the Secretary of Agriculture take an oath. However, this fact cannot militate against the position here advanced, since they are not required by law to do so. The only statute relevant to the instant question is Section 16 of Title 5 of the U.S.C.A., which provides:

"Oath of office. The oath to be taken by any person elected or appointed to any office of honor or profit either in the civil, military, or naval service, except the President of the United States shall be as follows * * *"

This provision has been held in 6 Comp. Gen. 112 (1926) to apply only to "officers in the constitutional sense" - such persons being those who are appointed by one of the methods designated in Art. C, Section 2 of the Constitution.

Since these attorneys are not occupants of an office in a constitutional sense, it is thus clear that they need not take an oath of office. In view of this fact, it is immaterial that the oath is taken, and such an act cannot alter the status of the persons in question. This was squarely held in the recent case of Murphy v. Collector of Internal Revenue, (70 F. (2d) 790, C.C.A. 2d, 1934) where the court said, in holding a special attorney to the State of New York not an officer:

"It is true that he took an oath of office, but this can scarcely be deemed conclusive, and particularly where, as here, it does not appear that he was required by law to do so. See Dawson v. Knox, 231 N.Y. App. Div. 490, 247 N.Y.S. 731." (pp. 791-2).

The position here advanced is fully supported by decisions on the status of special attorneys of the type here under discussion. Thus in Frank Lee v. The United States, 45 Ct. Cls. 57 (1910) the Court of Claims in denying retroactive pay for services performed in the interim between special appointments, said of an attorney employed as special assistant to a district attorney, pursuant to statute:

"The position of a special United States assistant attorney is not an office * * * His compensation is confined to the terms of his appointment." (p. 61)

Similarly, in United States v. Rosenthal, 121 F. 862 (C.C.S.D.N.Y. 1903) it was said that though special assistants to the Attorney General were specifically provided for by statute they were nevertheless not officers of the Department of Justice. See also Opinion of the Attorney General, July 29, 1933 on the status of an attorney for a National Bank Receiver as an "officer" of the United States.

It is equally clear that special attorneys on a per diem basis cannot be regarded as employees of the United States under these statutes but are rather, as was shown above, independent contractors, whose connection with the Department is intermittent, based solely on contract, and confined to one specific enterprise which they carry out at their own discretion.

The distinction between "employees" and independent contractors as laid down in the cases fully supports this conclusion. In 29 Op. Atty. Gen. 593 (1912) the difference is stated as follows (in characterizing the status of a deputy clerk of the district courts):

"The distinction is between those persons whose services are occasional and temporary, fixed by some contract of employment, and those whose services are general and indefinite in a line of duty prescribed by law." (pp. 595-6)

Similarly, in interpreting the scope of a Federal statute containing the phrase "and all employees whomsoever" (Title 5, Section 57 U.S.C.A.) it was held in 28 Op. Atty. Gen. 75 (1909) that the word "employee" as there used did not embrace persons (in this case expert witnesses) whose services have been contracted for in connection with a particular case in court and whose employment has no degree of permanence. It was there said:

"The word 'employee' as used in the statutes above cited * * * does not embrace an individual whose services have been contracted for in connection with a particular case in court, and with reference to whose employment there is no degree of permanency."

That an attorney engaged by the Government to prosecute particular claims in its behalf is an independent contractor and not an employee has been repeatedly held. Thus, in Louisville, etc. R.R. Co. v. Wilson, 138 U.S. 501 (1891) where a certain sum as attorney's fees was demanded under an order of court directing the receiver to pay "salaries of officers and wages of employees" it was held that an attorney did not fall within the meaning of the term "employee" as used in that order. In passing upon this question the following language was used:

"The terms 'officers' and 'employees' both, alike, refer to those in regular and continual service. Within the ordinary acceptation of the terms, one who is engaged to render service in a particular transaction is neither an officer nor an employee. They imply continuity of service, and exclude those employed for a special and single transaction. An attorney of an individual, retained for a single suit, is not his employee. It is true, he has engaged to render services; but this engagement is rather that of a contractor than of an employee. The services of the appellee, therefore, did not come within the order appointing the receiver."
(p. 505).

The same result was obtained in Lucas v. Howard, 29 F. (2d) 895, 280 U. S. 525 (1929) where an attorney under contracts with the cities of Houston, Navasota, and Victoria, Tex., to prosecute suits for these municipalities, was held to be an independent contractor and not to be an officer or employee of the State so as to exempt him from the payment of the Federal income tax on fees collected pursuant to such contracts. Similarly in Lucas v. Reed, 34 F. (2d) 263, 281 U. S. 699 (1929) it was held that income received by an attorney for services as special counsel in representing the State of Pennsylvania, was subject to the federal income tax, since an attorney performing such services was not an officer or employee of the State but was merely an independent contractor engaged in the prosecution of particular claims.

The recent case of Murphy v. Collector of Internal Revenue, supra, would appear to be conclusive on the issue of whether a special attorney on a per diem basis can be considered an officer or employee of the United States. The court there had before it a special attorney appointed to represent the State of New York in a proceeding before the American-British Arbitration Tribunal. It was there claimed that his compensation was exempt from the federal income tax. The court reiterated the tests laid down in Metcalf & Eddy v. Mitchell, 269 U. S. 514, 520 (1926):

"They took no oath of office; they were free to accept any other concurrent employment; none of their engagements were for work of a permanent or continuous character:
* * * Their duties were prescribed by their contracts and it does not appear to what extent, if at all, they were defined or prescribed by statute." (p. 520)

and concluded:

"He had no position of permanent or continuous tenure, was free to carry on concurrently his general law practice, and was employed for a single litigation. His own office employees assisted him in the preparation of the case, just as in any ordinary piece of litigation. We can see no distinction between his employment and that of the attorney held not to be an officer in Lucas v. Reed, 281 U. S. 699."

See also opinion of Attorney General of July 29, 1933 cited above. In view of the clear purport of the cases cited above, and the fact that since the statutes here in question are penal, they are subject to the rule of strict construction and will not be construed to include anything beyond their letter. (United States v. Wiltherger, 5 Wheat. 76 (1820); Sixty Pipes of Brandy, 10 Wheat. 420 (1825)) it is concluded that special attorneys engaged by the Agricultural Adjustment Administration on a per diem basis to work on particular litigation are neither officers nor employees of the United States and do not as such come within the purview of any of the statutes here in question.

The question whether such an attorney is subject to Section 198 of Title 18 of the U.S.C.A. as a "person holding any place of trust or profit, or discharging any official function under, or in connection with, any executive department of the Government of the United States" is more doubtful. The decision of the Attorney General on the status of an attorney for a national bank receiver on July 29, 1933 is directly relevant to this issue. After replying in the negative to the question of whether such an attorney is an officer or employee of the United States under Section 198 or Section 203 of Title 18, he said:

"It might be said that an attorney to a receiver of a national bank holds a place of trust or profit under or in connection with an executive department. In view, however, of the strict construction placed upon criminal statutes, and the fact that the compensation of such attorney is paid not from funds of the United States but from the funds of the bank, I am of the opinion that the attorney for the receiver cannot be included under that classification. That description follows immediately after the term 'officer of the United States', and it seems to me subject to the rule of ejusdem generis."

In spite of the broad language of this decision, its applicability to the instant issue is questionable. While an attorney to a receiver of a national bank would not come within the class of these "under or in connection with an executive department," the attorneys here under discussion definitely fall within that category. The holding may also be distinguished on the ground that the compensation of attorneys engaged by the Agricultural Adjustment Administration on a per diem basis is paid from funds of the United States.

In view of the inconclusiveness on this question of the above opinion, the decision in 23 Op. Att. Gen. 533 (1901) may be considered in this connection. The Attorney General there passed on the acceptance of an appointment as counsel for the delegates of the United States to the Pan-American Conference, by a person who was engaged as an attorney in prosecuting claims before the Spanish Treaty Claims Commission. The status of such an attorney under the instant statute was there described in the following language:

"* * * while he may not be an 'officer' as that term is there used, yet I am of the opinion that as to both the intent and letter of the section, he comes within the description of a 'person' holding any place of trust or profit or discharging any official function under or in connection with any executive department of the Government of the United States', and as such is forbidden to prosecute or aid or assist in prosecuting claims against the United States. The wisdom and policy of such a statute are obvious, and the reasons which operate to forbid one holding an important position in the Government to engage in the prosecution of claims against it, with the opportunity, real or suspected, to bring the influences of his position to bear in support of the claim he is advocating are operative also in the case of one holding such a place as that to which you refer." (p.534)

Assuming the applicability of this provision, the question arises whether a per diem attorney would be considered within the ambit of the Statute during the whole period of his appointment, or during that period only in which he is actually engaged in work on the particular case. The decision in 23 Op. Atty. Gen. 533 (1901) is also relevant to this issue. It was there held that while the acceptance of an appointment as counsel for the delegates of the United States to the Pan-American Conference by a person prosecuting claims against the Government would not subject such person to the penalties of this Section, yet, if while holding the place of such counsel, he should engage in the prosecution of claims against the United States, he would be subject to the penalties therein prescribed.

"That section imposes no penalty for the acceptance of an office or place by one who is engaged in the prosecution of claims against the United States. The penalties there prescribed are for the prosecution of such claims by one who holds an office or place such as is described in that section." (Italics supplied) (p. 534)

It would therefore seem that since the gist of the offense is the prosecution of claims against the United States while holding such a place in connection with a department of the United States a per diem attorney would be subject to the prohibitions of the Statute during the full period of his appointment.

A special attorney may, however, share partnership profits derived from the prosecution of a claim against the United States by another member of his firm during the period in which he holds such a "place of trust or profit". The Statute is explicit in its prohibitions and inhibits only specific conduct. Persons within the purview of its provisions may not:

" * * aid, or assist in the prosecution or support of any such claim, or receive any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist or in consideration of having aided or assisted, in the prosecution of such claim * * *"*
(Italics supplied) (see p. 3 supra)

These express terms indicate that individual participation "with intent to aid or assist" is of the essence of the offense under this Section. Should the prosecution be carried on entirely without the personal intervention of the attorney in question, the Statute would clearly have no application.

On this issue the decision in Fox v. Willis 114 Ky. 940, 72 S. W. 330 (1903) may be distinguished. This case involved an attorney who entered into a contract with another to assist him in a prosecution against the Government. Shortly afterwards he accepted the post of Minister to Hawaii which he held during the prosecution of the claim, engaging another to perform his part of the contract. Relying upon this Statute, the court denied recovery of his share of the fee under the contract saying:

"The question to be considered is, does the statute prohibit the contract attempted to be enforced? * * * It is admitted that A. S. Willis held the position of minister to Hawaii from this government * * *. The contract is in fact prohibited by section 5498 of the Revised Statutes of the United States, though the statutes only inflict a penalty, because the penalty implies a prohibition. * * * The penalty for doing the act being imposed, the act itself was prohibited by law." (p. 332)

It is submitted that the contract in this case was unexceptionable when entered into since the attorney had not at that time accepted the position of ambassador. The ground for the court's decision should therefore have been upon performance by the contractor, rather than the illegality of the agreement.

However, this decision is in any event clearly inapplicable to an agreement under which partnership profits arising out of all the business of a given firm, by whomever conducted, are shared. The holding in the above suit was addressed to a contract entered into in contemplation of and specifically calling for personal participation in the prosecution of a claim against the United States. Since in a partnership agreement the division of profits contemplates no definite litigation, and requires the participation of no particular attorney in any case, it is submitted that, if the special attorney on a per diem basis refrains from "aiding or assisting" in the prosecution of the claim he is free to accept partnership profits derived from such a prosecution.

QUESTION II

Are the foregoing statutes applicable to an attorney to a Milk Market Administrator under our typical milk license?

REPLY

Since the status of an attorney to a Milk Market Administrator is, for the purposes of these statutes, indistinguishable from that of the attorney discussed under Question I, the conclusions there reached hold here.

DISCUSSION

The milk market administrator under the typical license is empowered to engage attorneys under a general provision authorizing him to procure assistance in the performance of his official duties. Thus Section E of Exhibit A of the Amended License for Milk in the Des Moines/^{Sales}Area (issued May 4, 1934) provides:

"* * * The Market Administrator shall be entitled to (a) reasonable compensation which shall be determined by the Secretary, and (b) to incur such expenses, including compensation for persons employed by the Market Administrator as the Market Administrator may deem necessary for the proper conduct of his duties, which total expense shall be deemed to be the total cost of operation of the Market Administrator." (Italics supplied)

The position of an attorney engaged by a Milk Market Administrator under a license of this type is clearly on all fours with that of the special attorneys above discussed. Although he is retained to aid an official of the United States (since the Administrator has this status) and is paid out of public funds (namely, compulsory assessments collected pursuant to the license) his mode of appointment, tenure, duties, emoluments, and, in short, all the elements of his connection with the Government are indistinguishable from that of the attorney described in answer to Question I. On the authority of the cases there cited, therefore, it is concluded that an attorney to a Milk Market Administrator is merely an independent contractor and, since he is neither an officer nor employee of the United States in these capacities, he comes within the ambit of none of these Statutes.

It would seem, however, that such an attorney, although his relation to the Department of Agriculture is more remote than that of a per diem attorney to the Agricultural Adjustment Administration, is nevertheless, since he assists an official of the Agricultural Adjustment Administration in the performance of his duties, in a place of trust or profit in connection with an executive department of the United States. He may therefore also ^{be} subject to the prohibitions of Section 198 of Title 5 of the U. S. C. A., and may not prosecute or assist in the prosecution of a claim against the United States while he is engaged in work for the Market Administrator. For the reasons stated in reply to Question I, he may, however, share partnership profits arising out of the prosecution of such a claim.

QUESTION III.

Would a special attorney on a per diem basis engaged simultaneously by the Agricultural Adjustment Administration and by a Milk Market Administrator be subject to the Federal statutes restricting the compensation of employees holding more than one position?

REPLY

Since these attorneys are not employees of the Federal Government, they do not come within the scope of any of these statutes.

DISCUSSION

The statutes pertinent to the instant question are the following:

Title 5 - U.S. Code

Sec. 58 "Unless otherwise specifically authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary when the combined amount of said salaries exceeds the sum of \$2,000 per annum."

Sec. 62. "No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially authorized thereto by law:"

Sec. 69. "No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other department; and no allowance or compensation shall be made for any extra services whatever; which any officer or clerk may be required to perform, unless expressly authorized by law."

Sec. 70. "No officer in any branch of the public service, or any other person whose salary, pay or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefore explicitly states that it is such additional pay, extra allowance, or compensation."

All of these provisions have been held to be in pari materia, 34 Op. Atty. Gen. 490 (1925).

That the compensation of attorneys of the type under discussion is not subject to the terms of Section 58 is conclusively supported by the decision in Landrum v. U.S. Ct. Cls. 74 (1880). The court there said:

"This section relates to the discharge of the duties of an office by a person holding another office. In Herndon's Case we held that as deputy collector, he was not an employee of the Government if not an employee he certainly was not an officer; and therefore Landrum is not now seeking compensation for discharging the duties of another office."

Since the attorneys here in question are neither officers nor employees, it is clear that the statute is inapplicable to them.

Section 62, similarly, applies to persons receiving "salaries" and, in addition, is explicitly confined both to "officers", and to and "office to which compensation is attached." Decisions under this section clearly indicate that it is inapplicable to the special attorneys here under discussion. Thus it has been held that the word "office" as used in this section refers only to officers in the constitutional sense, (22 Op. Atty. Gen. 184 (1898) and that the phrase "an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars" refers to a fixed compensation of at least that amount, which is determinate and not merely a matter of speculation. United States v. Durlacher, 63 F. 672, (C.C.N.Y. 1894).

Section 69 is also inapplicable to the attorneys here in question since this statute similarly applies specifically only to individuals in the regular employment of the United States. This was held to be the case in Landrum v. United States, 16 C. Cls. 74 (1880) where it was said:

"This section relates to allowances or compensation to officers or clerks in a department for the discharge of duties belonging to other officers or clerks in a department. Herndon (deputy collector of internal revenue) was not an officer or a clerk in a department, and therefore the first portion of Section 1764 (this section) is not applicable. . . . It may be inferred from the context that the clerks who are forbidden by this section to receive compensation for extra services are the clerks in the executive departments - that large class of clerks who are specially recognized by statute, and whose compensation and duties are specially marked out."

The plain terms of Section 70 confine its ambit to those whose "salary, pay or emoluments are fixed by law or regulation." In view of the fact that special attorneys on a per diem basis and

DISCUSSION

The statutes pertinent to the instant question are the following:

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Sec. 58 "Unless otherwise specifically authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary when the combined amount of said salaries exceeds the sum of \$2,000 per annum."

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Sec. 69. "No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other department; and no allowance or compensation shall be made for any extra services whatever; which any officer or clerk may be required to perform, unless expressly authorized by law."

Sec. 70. "No officer in any branch of the public service, or any other person whose salary, pay or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefore explicitly states that it is such additional pay, extra allowance, or compensation."

All of these provisions have been held to be in pari materia, 34 Op. Atty. Gen. 490 (1925).

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"This section relates to the discharge of the duties of an office by a person holding another office. In Herndon's Case we held that as deputy collector, he was not an employee of the Government if not an employee he certainly was not an officer; and therefore Landrum is not now seeking compensation for discharging the duties of another office."

Since the attorneys here in question are neither officers nor employees, it is clear that the statute is inapplicable to them.

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Section 69 is also inapplicable to the attorneys here in question since this statute similarly applies specifically only to individuals in the regular employment of the United States. This was held to be the case in Landrum v. United States. 16 C. Cls. 74 (1880) where it was said:

"This section relates to allowances or compensation to officers or clerks in a department for the discharge of duties belonging to other officers or clerks in a department. Herndon (deputy collector of internal revenue) was not an officer or a clerk in a department, and therefore the first portion of Section 1764 (this section) is not applicable It may be inferred from the context that the clerks who are forbidden by this section to receive compensation for extra services are the clerks in the executive departments - that large class of clerks who are specially recognized by statute, and whose compensation and duties are specially marked out."

The plain terms of Section 70 confine its ambit to those whose "salary, pay or emoluments are fixed by law or regulation." In view of the fact that special attorneys on a per diem basis and

attorneys to Milk Market Administrators receive no salaries or emoluments fixed by law, but are engaged on a purely contractual basis, they clearly fall without the scope of this statute. This conclusion is decisively supported by the decision in Hedrick v. United States, 16 Ct. Cls. (1880) in which it was said:

"The 'salary', 'pay', or 'emoluments' of such 'officer' or 'person' must be 'fixed by law or regulation', in order to bring him within the provisions of this section. A 'salary' is 'fixed' when it is at a stipulated rate for a definite period of time. A 'pay' or 'emolument' is 'fixed' when the amount of it is agreed upon and the service for which it is to be given defined. A salary, pay, or emolument is fixed by law when the amount is named in a general order, promulgated under provisions of law, and applicable to a class or classes of persons."

QUESTION IV.

"Would an employee of the Agricultural Adjustment Administration receiving a salary of more than \$2,000 a year who is appointed without additional compensation to the position of Milk Market Administrator be subject to the terms of any of the statutes mentioned in Question III."

REPLY

The prohibition in these statutes is against additional compensation derived from holding another position. If the employee receives emoluments from one office only he is not within these Sections.

DISCUSSION

The decision in 34 Op. Atty. Gen. 490 (1925) established the fact that none of these statutes contain any prohibition against

the detail of a salaried employee of the Government to perform the duties of another position in the Government without extra compensation therefor, or the designation of such employee or officer to perform the duties of another position or office with his consent that no extra compensation therefore shall be made.

Section 69 of Title 5 of the U.S.C.A. impliedly recognizes this procedure as unexceptionable:

"No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other department; and no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform unless expressly authorized by law."

Since no salary is to be drawn from the position of Milk Market Administrator no difficulty in connection with this procedure need be anticipated under these statutes. It may be noted, incidentally, that an employee of the Agricultural Adjustment Administration who is also a Milk Market Administrator might come within the injunction against the holdings of two incompatible offices. Two offices have been held to be incompatible when the performance of the duties of one will prevent or conflict with the performance of the duties of the other, or when the holding of the two is contrary to the policy of the law. Crosthwaite v. United States, 30 Ct. Cls. 300 (1895). However, this rule is also directed at the receiving of salaries from both offices and, in any event, in the instant problem the situation may be subsumed under the rule that where two incompatible offices are held by the same person, to which are attached different salaries, he is entitled to the larger. Winchell v. United States, 28 Ct. Cls. 30 (1892); Webster v. United States, 28 Ct. Cls. 25 (1892).

Telford Taylor,
Acting Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 106

DURATION OF KERR TOBACCO ACT

The administration of the Kerr Tobacco Act, including the making of advances to the Secretary of Agriculture under Section 10(a) of the Act, is not limited to the tobacco crop year but may be continued indefinitely.

August 3, 1934.

MEMORANDUM TO MR. WARD M. BUCKLES
DIRECTOR OF FINANCE.

Pursuant to your request for an opinion, I submit the following.

QUESTION

Is the administration in general of the Kerr Tobacco Act, including the making of advances to the Secretary of Agriculture, under Section 10(a) of the Act, to be limited to tobacco crop year, or may the administration in general and the advances so set up continue indefinitely?

OPINION

The advances in question, as well as the administration in general of the Act, may continue indefinitely and are not to be limited by tobacco crop year.

DISCUSSION

Section 3 (a) of the Kerr Tobacco Act (Public No. 433, 73rd. Congress) provides that certain taxes shall be imposed on the sale of tobacco. Subsection (b) of this section further requires that the tax shall be applicable during the crop year 1934-1935, but that it may be applicable during the "next succeeding crop year" also. It is further provided, however, that the tax shall not apply after April 30, 1936. As the Act defines the term "crop year" to mean the period from May 1 to April 30 (Sec. 1 h), and as the Act was approved June 29, 1934, only two crop years can come within the provisions of the Act. Section 13 of the Act provides:

"Sec. 13. The tax shall terminate with respect to any type of tobacco at the end of the crop year current at the time the Secretary of Agriculture proclaims that rental and/or benefit payments under the Agricultural Adjustment Act are to be discontinued with respect to such type of tobacco or whenever the President finds and proclaims that the national economic emergency with respect to such type of tobacco has ended, whichever is the earlier."

By the specific provisions of Section 13 of the Act, the tax involved does not commence at the beginning of, or terminate at the end of, each tobacco crop year, but only "at the end of the crop year current at

the time the Secretary of Agriculture proclaims that rental and/or benefit payments * * * are to be discontinued." The crop year which may happen to be current at the time the Secretary makes his proclamation terminating the tax is not specified. For the levy of a tax upon any commodity, the Secretary of Agriculture need make only one proclamation. (See Sec. 9(a), Agricultural Adjustment Act). It is obvious that pursuant to such proclamation, benefit payments may be made during both crop years. It is therefore clear that Section 13 contemplates the possibility of the tax on tobacco existing and being collected during both crop years and provides that it shall be terminated at the end of "the" crop year current at the time the Secretary of Agriculture, in his discretion, decides that benefit payments will no longer be made on tobacco.

The provisions of other sections of the Act strongly fortify the conclusion that the Administration of this Act was not intended to be one measured by crop years, but rather that it was a continuous administration that was contemplated. Section 10 (a) of the Act provides that the proceeds derived from the tax are available for refunds of taxes. And Section 11 (a) provides that no refunds shall be made unless a claim is presented within six months after the date of payment of the tax. It would seem that in providing for such a six-month period it was contemplated that funds would always be on hand against which to make such refunds. A contrary conclusion would mean that by the expiration of the time specified for making the claim, and decision thereon, there might be no funds, because of the prior termination of the crop year, with which to pay the refund.

Furthermore, Section 10 (a) provides that the proceeds derived from the tax are available for "administrative expenses, * * * and other payments under this Act", and Section 10 (d) defines "administrative expenses" so as to include "expenditures for personal services and rent." It would hardly seem conceivable that for such continuous expenditures as salaries and rent, it was contemplated that the Act would be administered in such a way as to possibly leave no funds, during certain periods, for such items. A smooth and business-like administration of the Act necessitates an interpretation which would continuously make funds available for such items as salaries, rent, or any "other payments" found to be necessary under the Act. It is obvious that it is for just such purposes that Section 10 (a) makes a provision whereby advances can be made from the estimated future proceeds of taxes. A provision of this sort, in itself, contemplates a continuous administration of the Act, rather than one limited to a tobacco crop year.

It may possibly be argued that as the Act contemplates the possibility of no tax being levied during the second crop year of its duration - because by Section 3 (b) the levy of the tax is made mandatory only during the first crop year, and by Section 13 the President may terminate the tax at any time by finding that the national economic emergency with respect to tobacco has ended - therefore a tobacco crop year administration was intended. This contention might have more significance if an advance is requested against taxes which may possibly never be forthcoming.

It should be noted, however, that according to Section 10 (a) the advance may be made pursuant to an estimate concerning "the amount of the

tax which will be collected during a period following any such estimate not in excess of four months * * *." Therefore, the above question need not be determined where the four-month period falls completely within any crop year. As the present crop year extends to April 30, 1935, a pending request for an advance must be based upon an estimate of taxes to be collected within the next four months, which four-month period would of course be up well before the end of the present crop year. Furthermore, even though the tax be terminated by Presidential proclamation, it would seem that it was contemplated that some funds remain on hand for the purpose of tax refunds, and also for the various administrative expenses necessary to the proper termination of the Act.

CONCLUSION

It seems clear that a continuous administration of the Act was contemplated, and not one by tobacco crop year. The determination of this question, however, is not necessary in a situation where an advance is requested on the basis of a four-month estimate which falls within the crop year in which the estimate is made. I accordingly advise you that a warrant drawn in accordance with the estimate provided for in Section 10 (a) need not contain a fiscal or tobacco crop year limitation, but that funds under the warrant may remain continuously available.

Telford Taylor,
Acting Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 107

USE OF JONES-CONNALLY ACT FUNDS IN PORTO RICO,
ALASKA AND HAWAII

Funds authorized to be appropriated by the Jones-Connally (Cattle) Act, to eliminate diseased cattle, may be used for such purposes in Porto Rico, Alaska and Hawaii.

Opinion Section Memorandum No. 160
Dated August 3, 1934.

August 3, 1934.

MEMORANDUM TO MR. J. R. MOHLER
Chief of the Bureau of Animal Industry

Your memorandum to Mr. Chester C. Davis, dated July 28, 1934, pertaining to the use of Jones-Connally Cattle Bill funds in Porto Rico, Alaska, and Hawaii, has been referred to me, and in accordance therewith I submit the following:

QUESTION

May the funds authorized to be appropriated by the Jones-Connally Cattle Bill, to eliminate cattle suffering from tuberculosis or Bang's disease, be used for such purposes in Porto Rico, Alaska, and Hawaii?

OPINION

The funds may so be used in the named territories.

DISCUSSION

Section 10 (f) of the Agricultural Adjustment Act specifically provides that:

"The provisions of this title shall be applicable to the United States and its possessions, except the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone and Island of Guam."

As the Jones-Connally Bill is an amendment to the Agricultural Adjustment Act, this section also applies thereto.

By specific provision, therefore, of the Agricultural Adjustment Act, all funds appropriated for any activity authorized by the Act, may be employed in "the United States and its possessions" with certain exceptions. As Porto Rico, Alaska, and Hawaii are "possessions" of the United States, and are not included among those possessions specifically excepted from the provisions of the Bill, the funds in question may be used for the contemplated purposes.

It may also be noted that even without the express section of the Agricultural Adjustment Act making its provisions applicable to the territories in question, the conclusion would be the same, for Congress has specifically enacted that (with certain limited exceptions) all statutory laws of the United States "not locally inapplicable" shall have the same force and effect in all of these territories as in the United States. 48 U.S.C.A. Sec. 23 (Alaska); 48 U.S.C.A. Sec. 495 (Hawaii); 48 U.S.C.A. Sec. 734 (Porto Rico)

Telford Taylor
Acting Chief, Brief and Opinion Section
Office of the General Counsel.

EXCHANGE OF CATTLE PURCHASED IN DROUGHT AREAS

Cattle purchased with funds made available by the Agricultural Adjustment Act may be exchanged for cattle fit for immediate slaughter provided it can be shown that the exchange transaction will promote "production adjustment" within the meaning of the Act and provided that it is not inconsistent with the terms under which the cattle were originally purchased. Such an exchange is not inconsistent with the terms of the present Emergency Cattle Agreement.

Cattle purchased with funds allotted to the Secretary from the Emergency Relief Appropriation may be so exchanged provided such exchange is consistent with the terms of the Agreement under which the cattle were purchased and that it is consistent with the purpose of the Emergency Appropriation Act. In disposing of the cattle so purchased, however, emergency relief in the stricken areas should be the guide so far as practicable.

Cattle purchased with funds available under the Agricultural Adjustment Act may be exchanged for diseased cattle, in order to carry out the purposes of Section 6 of the Jones-Connally Act, provided such exchange is consistent with the terms of the original purchase.

Cattle donated by the Secretary of Agriculture to the Federal Surplus Relief Corporation may be so exchanged provided the exchange will promote "production adjustment" within the meaning of the Agricultural Adjustment Act, and provided that the terms on which the cattle are donated to the Corporation permit such disposition.

Cattle donated to State Relief Administration may be exchanged only upon terms and conditions similar to those controlling the disposition of cattle by the Federal Surplus Relief Corporation.

The provisions of Rev. Stat. 3709 and 3618 relating to the purchase and sale of government property, have no application to transactions made to promote the purposes of the Agricultural Adjustment Act, the Emergency Surplus Relief Corporation, or the Emergency Relief Appropriation.

August 4, 1934

MEMORANDUM TO COL. PHILIP G. MURPHY,
Chief, Commodities Purchase Section.

In reply to your memorandum of July 30, 1934, I submit my opinion upon the following:

QUESTION

May cattle purchased in the drought areas be exchanged for cattle fit for immediate slaughter in other sections, through the agency of
(1) the Secretary of Agriculture, or
(2) The Federal Surplus Relief Corporation, or
(3) an independent state relief agency?

OPINION

Part I.

A. Exchanges Made by the Secretary of Agriculture

a. Cattle purchased with funds made available by the Agricultural Adjustment Act as amended.

Such exchange is authorized under the Agricultural Adjustment Act provided it can be shown that the exchange transaction will promote "production adjustment" within the meaning of the Act and provided that it is not inconsistent with the terms under which the cattle were originally purchased. Such an exchange is not inconsistent with the terms of the present Emergency Cattle Agreement.

b. Cattle purchased with funds allotted to the Secretary from the Emergency Relief Appropriation.

The Secretary may exchange cattle so purchased provided such exchange is consistent with the terms of the agreement under which the cattle were purchased in the drought areas and with the purposes of the Emergency Appropriation Act. In disposing

of the cattle so purchased, however, emergency relief in the stricken areas should be the guide so far as practicable.

- c. Cattle suffering from tuberculosis, Bangs', or other disease, acquired under Section 6 of the Jones-Connally Act.

Cattle purchased with funds appropriated under the Agricultural Adjustment Act, may, if consistent with the terms of such purchase, be exchanged for diseased cattle.

B. Exchanges Made by the Federal Surplus Relief Corporation

- a. Cattle donated by the Secretary of Agriculture.

If the exchange will promote a "production adjustment" within the meaning of the Agricultural Adjustment Act and the terms on which the cattle are donated to the Corporation are changed to permit such disposition, it is within the authority of the Corporation.

C. Exchanges by State Relief Administrations.

Cattle donated to state relief administrations may be exchanged only upon terms and conditions similar to those controlling the disposition of cattle by the Federal Surplus Relief Corporation.

Part II.

Statutes Relating to the Purchase and Sale of Public Property

The provisions of Rev. Stat. 3709 and 3618, relating to the purchase and sale of government property, have no application to transactions made to promote the purposes of the Agricultural Adjustment Act, the Emergency Surplus Relief Corporation, or the Emergency Relief Appropriation.

STATEMENT OF FACTS

The Secretary of Agriculture is purchasing cattle in the drought stricken areas according to the terms of an Emergency Cattle Agreement, by which the producer agrees to sell cattle to the Secretary and

"to cooperate with further general programs pertaining to the adjustment or reduction of production and/or for the support and balance of the market for cattle and/or dairy products which may be proffered by the Secretary, pursuant to the Agricultural Adjustment Act, as amended."

According to the terms of this Agreement, the Secretary agrees to make both a "purchase payment", and in addition a "benefit payment" the entire amount of which is to be paid the producer to the exclusion of lienholders.

Pursuant to the terms of an Agreement entered into July 2, 1934 by the Secretary and the Federal Surplus Relief Corporation (hereafter called the "Corporation"), cattle purchased under the foregoing program are donated to the Corporation at the point of purchase. It is a part of this Agreement that all such cattle shall be distributed by the Corporation for relief purposes and "shall not reenter into normal trade channels."

Some of the cattle thus purchased by the Secretary and donated to the Corporation have been transported out of the drought area to sections where they can be fattened prior to slaughtering. The cattle thus imported are of superior quality to the native cattle. It has therefore been proposed that cattle from the drought area be exchanged for such native cattle, which are fit for immediate slaughter. The immediate slaughter of these animals will release land for the pasturing of drought area cattle now too thin to market.

It is understood that cattle purchases made by the Secretary to date have been entirely from funds authorized to be appropriated under the Jones-Connally Act. It is requested, however, that the question of exchange be considered also with reference to cattle which may be purchased from other funds appropriated by Section 12 of the Agricultural Adjustment Act or from funds appropriated by the Emergency Appropriation Act and allotted to the Secretary.

DISCUSSION

It is to be noted, at the outset, that the proposal for exchange forms no part of the original transaction by which the cattle are acquired by the Secretary. The legality of the original purchase from the producer, whether from Jones-Connally or from other funds appropriated by the Agricultural Adjustment Act or the Emergency Relief Appropriation Act, is not a problem for present consideration. The problem presented by the proposed exchange has a two-fold aspect:

- (1) the disposition of the cattle already acquired by the Secretary.
- (2) the acquisition, by exchange, of cattle from areas not stricken by drought.

In disposing of the cattle, it is apparent that the Secretary may adopt only such means as are (1) consistent with the terms of the Agreement by which they were purchased from the producer and (2) which are consistent with purposes of the Act which authorized the appropriation of the funds with which the purchase was made. For example, cattle purchased with funds available only for the removal of surplus could not properly be used to increase production. Furthermore, if the cattle are turned over to another agency for disposition, that agency in turn may dispose of the cattle only in ways which are (1) consistent with the terms on which they were acquired from the Secretary and (2) consistent with the purposes which that agency is authorized to promote. The acquisition of cattle taken in exchange must similarly be within the powers and purposes of the agency effecting the exchange.

In addition to these considerations which go to the purpose of the various emergency statutes and which will be treated as Part I of this memorandum, there is the question of the applicability of Rev. Stat. Sections 3769 and 3618, relating, respectively, to the purchase and sale of government property. The treatment of this question will constitute Part II.

PART I.

A. Exchanges Made by the Secretary of Agriculture

a. Cattle purchased with funds made available by the Agricultural Adjustment Act as amended.

The purposes for which such funds are authorized to be expended, excluding those not pertinent to the problem in hand, are:

Under 12(a), as originally enacted -

Rental and benefit payments made with respect to reduction in acreage or reduction in production for market

Under 12(b) -

Expansion of markets and removal of surpluses, Rental and benefit payments

Under 12(a) as amended, the following additional purposes - Financing of surplus reductions and production adjustments with respect to the dairy- and beef-cattle industries

Supporting and balancing the
markets for the dairy- and
beef-cattle industries.

The present cattle buying program undoubtedly promotes a "reduction in production for market" and "a removal of surplus". The letter of the Secretary to Mr. Hopkins which forms the basis of the present agreement relating to the donation of cattle to the Corporation, plainly states that he is proceeding under the authority conferred by the Act to effect "the removal of surpluses," and that the arrangement making them available for relief is "in accordance with the announced policies of the President as to the removal of surpluses." Thus the method of disposing of the cattle, since it assures their removal from commercial channels is itself a means of accomplishing one of the purposes of the Act. A substitute plan by which such cattle would be exchanged by the Secretary for others is clearly not an appropriate means of accomplishing such purposes, since it is understood that the exchange will leave in the hands of the producers who trade in their stock, cattle of intrinsically superior economic value.

It is possible, however, with Jones-Connally funds, to use the powers of the Secretary for purposes of "production adjustment". By "production adjustment" cannot be meant any activity which affects production but such adjustment only as tends to promote the declared policy of the Act. Within this general limitation, however, it would seem that production upward or downward may be the goal; and the term may even be given an enlarged interpretation which would embrace the improvement of herds so as to secure production equal in amount but of better quality, or at lower cost. In such case an exchange proposal might well be consistent with, and indeed promote, the purposes of the Act pursuant to which the cattle were purchased.

We do not intend to say that the transaction by which the Secretary disposes of cattle must serve the same purpose as the transaction by which the cattle were acquired. There is an alternative. The method of disposing of the cattle may indeed be a means of carrying out the purpose of the original purchase. If it does not serve as such a means, it must find its justification in the promotion of some other purpose authorized by the Act. It does not matter whether the transaction is one of sale alone, or of purchase alone, or an exchange partaking of the nature of both. The Act confers no specific authority to buy or to sell, but such transactions as are reasonably necessary or appropriate to carry out the purposes of the Act are deemed, under established rules of construction, to be within the authority of the Secretary. Transactions, however, entered into for purposes not authorized by the Act are clearly not within his authority, and he may not, therefore, merely because he has lawfully acquired cattle, proceed

to trade in the same for unauthorized purposes such as direct relief or herd improvement not falling under the head of "production adjustment."

In conclusion, it is my opinion that if, under existing conditions of supply and demand, it can reasonably be determined that an exchange will promote a "production adjustment" within the meaning of the Act, and such adjustment is consistent with the terms under which the cattle were originally purchased, then it is within the authority of the Secretary to make such exchanges.

The terms of the present Emergency Cattle Agreement are, in my opinion, not inconsistent with an exchange proposal. It is true that under the terms of the Agreement the producer recognizes the benefit payment as "made in consideration of his participation in the reduction of production effected by this agreement," indicating that the Agreement itself is intended to effect a reduction. This statement appears under "Performance by Producer," however, and the performance by the producer so far as the immediate transaction is concerned is complete when the cattle are delivered to the agent authorized by the Secretary. The Secretary does not undertake to keep the cattle actually purchased out of production and the general reduction purpose is equally served if the cattle for which they are exchanged are removed from production.

b. Cattle purchased with funds allotted to the Secretary from the Emergency Relief Appropriation.

The funds appropriated by the Emergency Relief Appropriation Act may be used, among other purposes, for

"the purchase, sale, gift or other disposition of seed, feed, freight, summer fallowing and similar purposes."

By the Executive Order of June 23, 1934, the sum of \$43,750,000 allocated to the Secretary or such agency as he may designate may be used for

"the purchase, sale, gift or other disposition of seed, feed, and livestock and for transportation thereof."

It has already been determined that such funds may, consistently with the purposes for which appropriated, be used for purchases under the Emergency Cattle Program. Op. Sect. Mem. No. 143. As there stated, "it would seem that the only purposes under the Act for which the funds could be employed are those which would have the effect of giving direct relief to agricultural areas 'stricken' by drought, or by other similar disaster." Ibid. at 2. In the

case of purchases from sufferers in the drought areas, the purchases themselves serve a relief purpose and the expenditure is therefore within the purposes for which the funds were appropriated.

The disposition of the cattle thus acquired, however, raises another question. The proposed exchange is clearly not inconsistent with the purpose for which the cattle were acquired, and it will also serve the public interest in that it will enable producers in areas not stricken by drought to improve their stock. In view of the general purpose of the Emergency Appropriation Act, however, it may be questioned whether the obligation of the Secretary, in disposing of the cattle, does not extend to the use of them for relief purposes, when such use is practicable. Looking to the policy of the Act, I am of the opinion that the relief of emergency conditions in the stricken areas is the appropriate primary guide in such disposition.

So far as the individual producer in the drought area is concerned, it is clear that the proposed exchange will add nothing to the relief and benefit which he receives from the original purchase by the government. It is possible that relief benefits of a more remote character may be shown, as, for example, if the slaughter of the animals taken in exchange yields a larger amount of canned meat for relief purposes; or, more strikingly, if it is advisable to slaughter at once cattle now in condition for marketing in order to have an adequate supply of meat for relief purposes. There is nothing in the Emergency Appropriation Act which requires that such purchases be made in the drought areas. In the situation described, therefore, the purchase of cattle not suffering from drought would itself be justified as a relief measure, and their replacement with animals from the drought area would, by furnishing the consideration, also serve to accomplish the statutory purpose.

Again, however, such exchange would not be permissible if inconsistent with the terms of the agreement under which the drought-area cattle were purchased.

- c. Cattle suffering from tuberculosis, Bangs' or other diseases acquired under Section 6 of the Jones-Connally Act.

Section 6 of the Jones-Connally Act authorizes an appropriation

"to enable the Secretary of Agriculture, under rules and regulations to be promulgated by him and upon such terms as he may prescribe, to eliminate diseased dairy and beef cattle, including cattle suffering from tuberculosis or Bangs' disease, and to make payments to owners with respect thereto."

The Secretary is thus authorized, within the limits of the appropriation made, to undertake a program for the elimination of diseased cattle. In my opinion he is not limited in the exercise of this authority to the direct purchase of such animals but he may use any reasonable and appropriate means which will compensate the owners for their cattle. He may, therefore, use such funds for the purchase of cattle in the drought areas or elsewhere and exchange these for infected cattle which are to be eliminated.

Similarly, I see no objection to the use of cattle purchased with funds available under the Agricultural Adjustment Act for purposes of such exchange, provided the transaction is consistent with the terms under which they were originally acquired. In such case, of course, the original purchase must have been justified under the purposes of the Agricultural Adjustment Act itself. There can be no objection on the ground that the effect of using the cattle in this way would be for all practical purposes to augment the appropriation made for the elimination of diseased cattle. This might be true if the cattle acquired under the Agricultural Adjustment Act had, like most government-owned property, a commercial value which could be realized at a sale, the proceeds of which would then be covered into the Treasury under the provisions of Rev. Stat. Section 3618. But, by the very terms of their acquisition, such cattle may not be disposed of in ordinary commercial channels. They may be destroyed but they may not be sold on the general market. There would seem to be no reason, however, why they may not be used to supply the consideration for the acquisition of cattle which are to be destroyed as part of a disease-elimination program.

B. Exchanges Made By the Federal Surplus Relief Corporation

a. Cattle donated by the Secretary of Agriculture

Under the terms of the present Agreement which the Corporation cattle donated by the Secretary are to be distributed "for relief purposes" and "shall not reenter into normal trade channels." Any exchange arrangement by which producers not qualified for relief or rehabilitation should be given cattle from the drought areas in exchange for their own cattle of interior breed would clearly be a violation of the terms of this Agreement, because it would not be "for relief purposes." It is clear also that in any future Agreement which may be made the Secretary must attach to any donation of cattle to the Corporation terms which will insure a disposition of the cattle not inconsistent with the purposes for which they were originally acquired. If that purpose is the removal of surplus then it must be provided that the cattle shall not reenter normal trade channels. However, if the

purpose is "production adjustment" in a more general sense, it may be that more liberal terms of exchange will be permissible, to the extent possibly, if justified by existing conditions, of building up production in the area to which the cattle are transferred.

In such case, however, the further question will arise: is the Exchange within the purposes for which the Federal Surplus Relief Corporation is established? The purposes of the Corporation, as set forth in the Articles of Incorporation, are very broad. They include, in addition to the exercise of powers which may be delegated to it pursuant to various emergency acts including the Agricultural Adjustment Act and the Federal Emergency Relief Act of 1923, the following:

"(a) To relieve the existing national economic emergency by expansion of markets for, removal of, and increasing and improving the distribution of, agricultural and other commodities and products thereof;

"(b) To purchase, store, handle and process surplus agricultural and other commodities and products thereof, and to dispose of the same so as to relieve the hardship and suffering caused by unemployment and/or to adjust the severe disparity between the prices of agricultural commodities and other commodities and products thereof;

"(j) To enter into and encourage farmers, producers and others to enter into marketing plans and agreements and to cooperate in any plan which provides for reduction in the acreage or reduction in the production for market of agricultural commodities;

"(k) To engage in any activity in connection with or involving the production, carrying, shipping, storing, exporting, warehousing, handling, preparing, manufacturing, processing and marketing of agricultural and/or other commodities and/or products thereof;"

Production adjustment is not specifically included in the above. Moreover, the provisions of Article 3 "(a)" relating to "removal of" agricultural products and of "(j)" which specifically provides for reduction in production point away from any production activity not directed to reduction. However, "(k)" provides for engaging in "any activity in connection with or involving production." I am therefore of the opinion that, upon an adequate factual showing that the exchange will promote a "production adjustment" within the meaning of the Agricultural Adjustment Act as amended, the exchange will be also in transaction within the purposes of the Federal

Relief Corporation.

The technical nature of the transaction presents no difficulty. Article 3(i) empowers the Corporation

"To purchase, or otherwise acquire, to hold, or otherwise to deal in, to sell or otherwise dispose of any and all agricultural and/or other commodities, and/or products thereof and to loan and/or borrow money upon the same;"

The words "or otherwise to deal in," coupled with authority to acquire, sell, and dispose of are ample to embrace transactions of an exchange nature.

C. Exchanges by State Relief Administrations.

In making commodity grants to the states consisting of cattle donated to the Corporation by the Secretary of Agriculture it is obviously incumbent upon the Corporation to assure itself that the cattle will be used for such purposes only as are permitted by the terms of the agreement under which the cattle were acquired from the Secretary. Under the present agreement, this use is limited to relief purposes.

It is not necessary or advisable at this time to go into the question of how such limitations may be effective unless the donation of the cattle to the states is made subject to conditions incompatible with the idea of a "grant" in the legal sense. It is enough to say that if the state relief administration is an independent body and if the cattle have been donated to it by an outright "grant," they can no longer be "public property" within the meaning of Rev. Stat. 3618 which requires that the proceeds of the sale of public property be deposited in the Treasury of the United States. The provisions of this and other federal statutes relating to public property can therefore have no application to the cattle thus donated.

PART II.

Statutes Relating to the Purchase and Sale of Public Property.

Rev. Stat., Section 3709, 41 U.S.C.A. Section 5 provides:

"Except as otherwise provided by law
all purchases and contracts for supplies

or services in any of the departments of the Government and purchases of Indian supplies, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service."

This statute is obviously designed to protect the government ⁱⁿ purchasing supplies from outside contractors for government use. That they do not apply to transactions, such as benefit payment contracts, under the Agricultural Adjustment Act, is a matter not in dispute. It is plain that compliance with the requirements of public bidding, and purchase from the lowest bidder, would defeat the entire purpose of the transaction.

Related in policy and subject matter to Rev. Stat. Section 3709 is Rev. Stat. Section 3618 which provides

"All proceeds of sales of old material, condemned stores, supplies, or other public property of any kind, except of sales for which a different provision for the disposition of the proceeds is made, shall be deposited and covered into the Treasury as miscellaneous receipts"

It is clear that the cattle purchased by the Secretary are "public property." In the case of hogs purchased under the Emergency Hog Program of 1933 it was concluded that the cash proceeds of sales made of various by-products must be covered into the Treasury in conformity with this section. See Op. Sect. Mem. 57; Op. Sect. Mem. 86.

An exchange between two departments of the government itself, since it involves no change of title, is not a sale and therefore not within statutory requirements relating to the disposition of public property. 32 Atty. Gen. 511 (1921). But, under accepted interpretations of these requirements, a direct exchange with outside contractors is not permissible. 15 Op. Atty. Gen. 322 (1877); 3 Comp. Gen. 304 (1923); 5 Comp. Gen. 798 (1926). Thus, when it was proposed to exchange an old press for a new one with the payment of a small additional sum to the manufacturer, it was advised instead that two transactions be made, one a sale of the old press and the other a purchase. The proceeds from the sale would necessarily be paid into the Treasury. 15 Op. Atty. Gen., supra. When the provisions of Rev. Stat. 3709 relating to public bidding are applicable, the government in inviting bids may ask for an allowance on

old material which is to be disposed of. If the lowest bidder allows as much as, or more than, could be obtained for the old material in the open market, there is no legal objection to the sale of it to such bidder. But the contract cannot be awarded unless by so doing the net price to the government is less than could otherwise be obtained, and any amount allowed for the old equipment must be covered into the Treasury, the full purchase price of the new being charged to the appropriation available therefore. 3 Comp. Gen. 304; 5 Comp. Gen. 798. It is apparent that, for the purposes of this statute at least, a transaction by which cattle are exchanged for cattle would be considered a sale no less than a transaction in which the consideration is a payment in cash.

If the principle of the statutes on which these decisions rest be looked to, it is evident that they are designed to protect the government in bargains with third parties which affect the acquisition and sale of public property generally. Thus, the exchange of royalty oil for fuel oil provided for in the fraudulent lease of the Teapot Dome oil reserve was condemned by the court as "inconsistent with the principle upon which rests the law requiring purchase money received on the sale of government property to be paid into the Treasury." See Mammoth Oil Co. v. U. S., 275 U.S. 13, 34 (1927). But, in my opinion, these restrictions can have no application to transactions in which the government acts, not to protect its own interests as a proprietor, but for the benefit of the persons with whom it deals. The government here is not acting as an ordinary contractor but for the general welfare, carrying out a mandate of Congress in the interest of agricultural producers. For this reason, the purchase of cattle to remove surplus is not subject to the requirement of public bidding. For the same reason, if the transaction of exchange, supplementing the original purchase, is itself a transaction in furtherance of the program of production adjustment authorized by the Act, it cannot be subject to the requirements which normally govern the disposition of government property. The Secretary in the disposition as well as in the acquisition of a surplus commodity for "surplus removal" or "production adjustment" purposes is controlled by the policy of the Act; he may admittedly destroy the same, or finance its export abroad by the payment of a bonus. No reason can be seen why he may not equally report to an exchange device when the exchange itself will promote the objects of the Act.

This opinion is not inconsistent with the opinion previously given by this Section that the proceeds of sales made of by-products resulting from the Emergency Hog Program must be covered into the Treasury. In that case the Secretary had disposed of inedible grease and tankage through ordinary commercial channels. For the purposes of that immediate transaction he was representing the proprietary interests of the government. There was therefore no reason why the proceeds of the sale should not be subject to the rule of the statute requiring deposit into the Treasury, but the question of exceptions "where essential to the accomplishment of a particular transaction in the performance of a statutory duty" was expressly reserved. See Op. Sect. Mem. No. 57, at 14.

For the reasons above stated I do not rely upon the exception found in Section 549, 5 U.S.C.A. which reads:

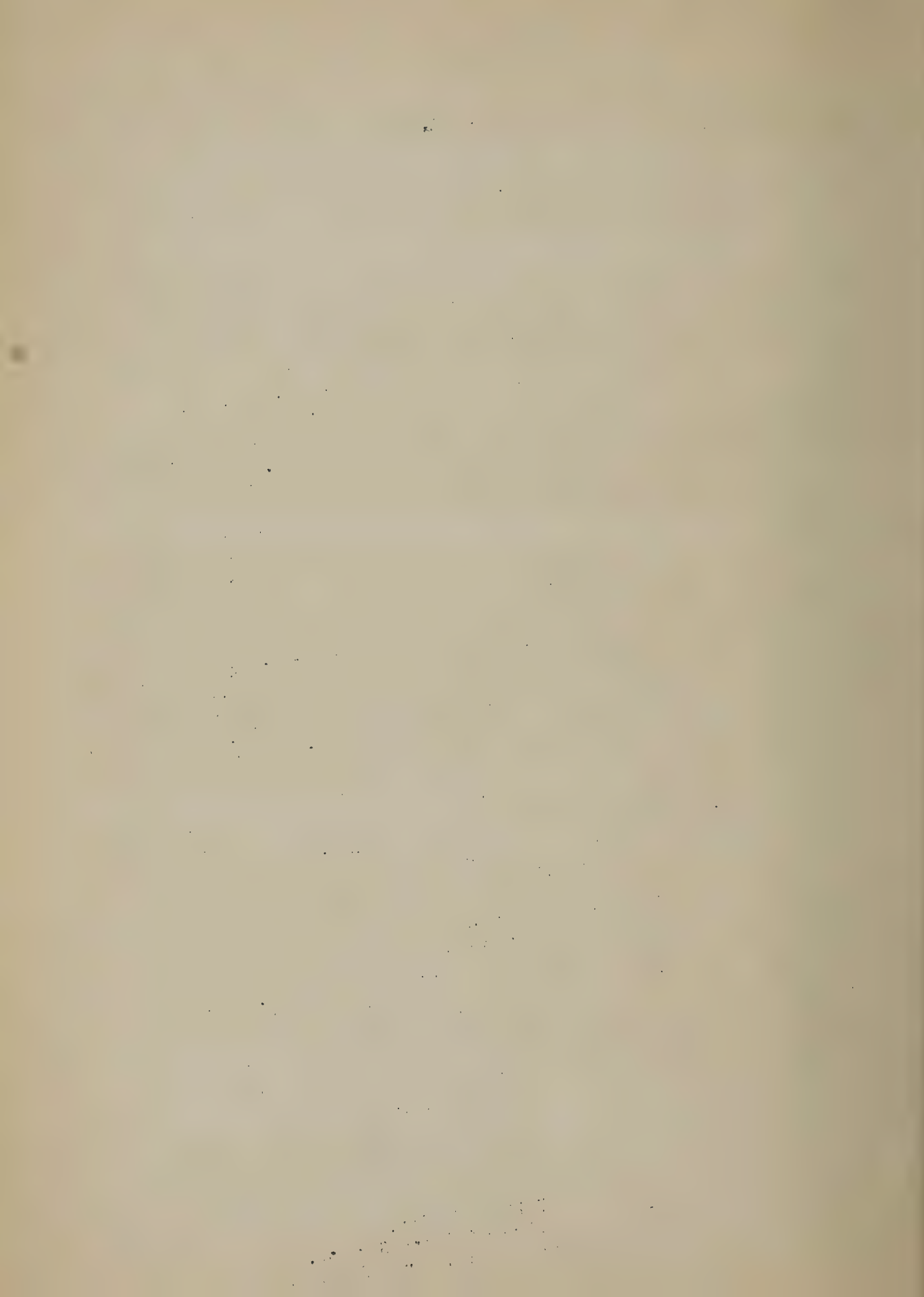
"The Secretary is authorized to sell in the open market or to exchange for other livestock such animals or animal products as cease to be needed in the work of the department . . ."

This provision would seem to apply to livestock used in the normal work of the department and to have no application to transactions such as those contemplated by the Agricultural Adjustment Act which have as their object production adjustment in the country as a whole. If, however, the conclusion that the provisions of Rev. Stat. 3618 are not applicable to these transactions is rejected, on the ground that animals purchased are to be dealt with on the same basis as other livestock acquired by the Department, then this special statutory exception would become applicable to permit exchanges, subject only to the proviso that any moneys received as a "bonus in the exchange of the same" shall be covered into the Treasury as required by this statute.

In the case of transactions under the Emergency Relief Appropriation and by the Federal Surplus Relief Corporation, similar reasoning would prevail, even in the absence of other factors to take exchanges by them out of the provisions of Rev. Stat. Sections 3709 and 3618. In the case of the Emergency Relief Appropriation it is specifically provided that expenditures "may be made without regard to the provisions of Section 3709" and, further, that the manner in which they shall be incurred shall be determined by the President. Moreover, the phraseology in that Act embracing purchase, sale or other disposition is broad enough in itself to include exchanges. In the case of the appropriation for the elimination of diseased cattle, the Secretary is authorized to eliminate them "upon such terms as he may prescribe."

In the case of the Surplus Relief Corporation, if it be conceded that cattle owned by the Corporation is "public property" because of the relation of the Corporation itself to the government (see 3 Comp. Gen. 606 regarding property of the U. S. Shipping Board Emergency Fleet Corporation) it does not follow that its disposition is controlled by Rev. Stat. 3618. The reasons which operate to take the disposition of cattle purchased by the Secretary out of the requirements of the statutes controlling the acquisition and sale of public property in the ordinary operations of the government apply with at least equal force to the operations of the Corporation.

Telford Taylor,
Acting Chief, Brief and Opinion Section,
Office of the General Counsel.



No. 109

BENEFIT PAYMENTS FOR CROP SUBSTITUTION
OR REDUCTION OF TOTAL CROP AREA

Under Section 8(1) of the Agricultural Adjustment Act, benefit payments may be made to producers of basic agricultural commodities for an increased production of hay, pasture or woodland, without specifically ascertaining that such production has been accompanied by a corresponding reduction in the production of basic commodities.

Benefit payments may likewise be made to producers of varied crops of basic and non-basic commodities for a reduction of their total planted acreage without reference to whether the reduction will be in basic or non-basic commodities.

August 6, 1934.

MEMORANDUM TO DR. A. G. BLACK, Chairman
General Committee on 1935 Production Adjustment Program

In response to your memorandum dated July 24, 1934, addressed to Mr. Bliss, I submit my opinion upon the following:

QUESTIONS

5. 35a Can benefit payments be made for increasing production of hay, pasture and woodlots (which would decrease production of basic crops) or must the payments be made strictly for adjusting production of basic crops?

6. Under present provisions of the Act, can we make benefit payments to producers for reducing total crop acres without regard to specific crops produced, or can we only make payments for adjustment in production of basic commodities?

OPINION

5. Question 5, I understand, is asked with the following plan in mind: The Administration proposes to go to a producer of basic agricultural commodities and ask him to reduce the production of these commodities and substitute on the fallow land hay, pasture or woodlands. However, the Administration does not want to undertake the burden of investigating in order to discover whether each farmer has reduced his base production of the basic agricultural commodities, but wishes to make payments on the number of acres on which he substitutes hay, pasture or woodlands for these basic commodities. Furthermore, they do not wish to be burdened with the problem of investigating whether the increase in acreage in hay, or the other named products has been made at the expense of these basic commodities.

In answer to this question, and in support of this plan, it may be stated that such benefit payments as will accord with this scheme, can be made under the terms of the Agricultural Adjustment Act.

6. The plan from which question 6 arises is the following: Can the Administration go to a producer who grows on his land a varied crop both of basic and non-basic commodities and contract with him to reduce his acreage by a given fraction without reference to whether the reduction will be in basic or non-basic commodities and permit him to grow thereon either hay, pasture or trees.

The answer to this question is the same as to that above, and the plan may be legally executed.

DISCUSSION

Both of these plans may be legally supported if coming within the powers of the Secretary of Agriculture by section 8 (1) of the Act. Section 8 (1) reads as follows:

"In order to effectuate the declared policy, the Secretary of Agriculture shall have power --

"(1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments:"

This paragraph does not require that each benefit contract entered into with the producer shall call for a reduction in acreage or production of basic commodities, but only that the total scheme of contracts should result in a reduction in acreage or production of one or more basic commodities. Therefore, if the plans proposed by the questions stated above will result in the reduction in the acreage or production for market of any of the basic commodities, such a plan may be carried out through benefit payments authorized by section 8 (1) of the Act.

This interpretation will be found to be supported by the legislative history of the Act. Secretary Wallace, in describing before the Senate committee which reported on the Agricultural Adjustment Act the powers which would be granted to the Secretary of Agriculture by the terms of the Act, said, at page 9 of the Hearings:

"That section covers substantially all the powers of the Secretary relating to production, but leaves the Secretary free to use on each particular crop that method of reduction which appears most effective for that product. * * * it may be by renting land in particular areas, or it may be by renting

land pro rata from every farmer producing, or it may be by paying the farmers to retire lands in production and making them a benefit payment as proposed under the original allotment plan."

The House Report upon the bill also shows the breadth of discretion which was intended to be conferred upon the Secretary:

"In order to achieve the above policy of restoration of the purchasing power of farm commodities, the bill gives the Secretary of Agriculture broad powers. No one system of control is adaptable to the production and marketing of all agricultural commodities. No one system of control has in the past been found acceptable to all interests. It is therefore provided the powers granted the Secretary shall be sufficiently flexible to enable him to adapt administrative action both to the inherent differences governing production and marketing of various basic agricultural commodities and to changes in our economic situation at home and abroad. This same flexibility will permit the substitution of a different plan if the one first applied works out unsatisfactorily." (House Rep., #6, p. 3; Legislative History, pp. 21-22)

The Secretary may, therefore, enter into any scheme of contracts with producers of a basic commodity which will result in a general reduction in acreage or production of a basic commodity. Few limitations on the type of contract to be signed need be imposed. For instance, if it is thought that by demanding and paying farmers for increased production of hay, pasture or woodlands, there will be an equivalent reduction in the amount of basic commodities produced, then such a scheme may be proclaimed by the Secretary. However, both in this proclamation of the scheme and in the contract itself, a statement should appear to the effect that the scheme is being executed in order that there will be a reduction in the amount of basic commodities produced. This statement would militate against a psychological reaction which might lead one to argue that such a scheme would not constitute a reduction program but a bounty for the production of hay, etc. For, if a court should determine that the scheme was not one for the reduction of basic commodities but only a scheme of bounties on the production of hay, etc., then it might declare the processing tax used to raise the funds to carry out the scheme to be unauthorized by the terms of section 9 (a) of the Act. It would do so because of its belief that no benefit reduction program was in effect upon the taxed basic commodities. To avoid this danger the contract should read as calling for substitutes on the rented acreage of hay, pasture and woodlands for the basic commodities named. It is left to the skill of the draughtsman to draw a contract which on the one hand would lead a court to view it as part of a reduction program, while on the other hand the Administration might achieve its desire of having the producer consider the contract as a government subsidy for the production of hay, etc.

There is no need that such contract should measure the amount of payment by any scheme other than the number of acres on which substitutes for the basic commodities have been planted, and the Secretary may, by regulation, determine such number of acres in terms of the increased acreage of hay, pasture or woodlands. This proposition is supported by the wording of section 8 (1) of the Act which provides that payments should be made "in such amounts as the Secretary deems fair and reasonable." Therefore, there can be no demand that any particular scheme, such as one calculated upon base production, should be employed.

The plan proposed in question 6 also comes within the terms of section 8 (1) as interpreted above, since it is a scheme by which the rental of a portion of land from all farmers will lead to a general reduction in acreage devoted to basic commodities. The contract for this plan ought to read as a promise by the producer not to plant on such rented acreage any of named basic commodities. Furthermore, following the terms of past contracts, the Administration may prohibit the planting of named non-basic commodities on such land. However, it may be stipulated that the producer may grow hay, pasture or trees on such acreage. There is no reason to believe that the producer could not be required by the terms of the contract actually to grow these three products.

Payments under this scheme may be made on the basis of acreage rented and need not call for any base production measurements. Payments on the basis of acreage would constitute a scheme which might be properly deemed by the Secretary to be fair and reasonable.

In following the lines thus set out it is believed that the Administration would meet with no difficulty in executing either of the plans discussed herein.

Telford Taylor,
Acting Chief, Brief and Opinion Section
Office of the General Counsel

No. 110

BREACH BY LANDLORD OF COTTON ACREAGE

REDUCTION CONTRACT WHEN MANAGING

SHARE TENANT PERFORMS IN FULL

When a 1934 and 1935 Cotton Acreage Reduction Contract has been signed by the owner and a managing share tenant, and the owner has planted cotton on other land controlled by him without entering into a similar contract with respect thereto, payment may be made to the managing share tenant, notwithstanding the owner's failure to perform.

Payment may be withheld from the owner, notwithstanding payment to the managing share tenant.

The contract may not be cancelled as to the owner alone without the consent of the managing share tenant.

The contract may not be cancelled as to 1934 and affirmed as to 1935.

(See also Opinion No. 13th (Opinion Section Memorandum No. 184))

August 7, 1934

MEMORANDUM TO MR. R. K. McCONNAUGHEY
Acting Chief, Benefit Contract Section

Re: 1934 and 1935 Cotton Acreage Reduction Contract

In response to your memorandum of April 21, I submit below categorical answers to certain questions which arise in connection with the problem you report, together with my opinion in support of the answers submitted.

QUESTIONS AND ANSWERS

When a 1934 and 1935 Cotton Acreage Reduction Contract has been signed by the owner and a managing share tenant, and the owner has planted cotton on other land controlled by him without entering into a similar contract with respect thereto,

- (1) May payment be made to the managing share tenant, notwithstanding the owner's failure to perform? Yes.
- (2) May payment be withheld from the owner, notwithstanding payment to the managing share tenant? Yes.
- (3) May the contract be cancelled as to the owner alone? Not without the consent of the managing share tenant.
- (4) May the contract be cancelled as to 1934 and affirmed as to 1935? No.

OPINION

(1)

The Secretary may make payments to the managing share-tenant notwithstanding the default of the owner.

In the 1934 and 1935 Cotton Acreage Reduction Contract (hereafter called the "Contract"), the items of "Performance by Producer" are enumerated in Part I. The items of "Performance by Secretary" are set forth in Part II and, as there stated, constitute the "consideration for the performance by the producer of the terms and

conditions of this contract." When the managing share-tenant signs with the owner, the Contract does not clearly indicate whether, or how, the acts of performance are to be apportioned between them, or whether their obligation is joint or several. Indeed, a preliminary question arises as to whether the managing share-tenant, in signing the Contract with the owner, is to be regarded as making any offer at all, or whether his signature is to be regarded merely as a manifestation of assent to the indicated distribution of rental and benefit payments, in case the owner's offer is accepted and the owner's obligation performed.

It is stated on page 1 of the Contract (footnote 3) that "managing share tenants . . . may join with the owners in signing contracts as provided by paragraph 12." Paragraph 12 itself states in mandatory terms that "in the event this farm is operated by a managing share-tenant, said tenant shall sign this contract with the owner . . ." That the signatures of both owner and managing share tenant were required in all such cases is indicated by the following excerpts from "Questions and Answers Covering 1934 and 1935 Acreage Reduction Plan" (Form Cotton 4 - December 18, 1933) published by the Production Division and widely used "for the information of cotton producers" in connection with the signing up of the contracts.

"Question 28. Is a cash-tenant for a period of less than 2 years or a managing share-tenant eligible to sign the contract if the owner or landlord refuses to sign the contract with him?

Answer: No."

"Question 31. Can an owner or landlord enter into a contract covering a farm rented to and operated by a cash tenant or a managing share-tenant?

Answer: Yes, if the tenant is willing to enter into the contract with him."

Neither in the Contract itself, nor in the documents used in connection with the signing up of the Contracts, is the language such as to indicate that the managing share-tenant was intended to be merely a beneficiary, with no obligations for actual performance on his own part. On the contrary, in signing the Contract "with the owner", the inference is inescapable that he was undertaking at least some part of the burden of performance. What is inference from the language of the contract is explicit in the statement in the answer to Question 31 referring to the tenant as "willing to enter into the contract with" the owner.

The extent of the obligation undertaken is not so easily determined. As has been stated, Part I sets forth the items of "Performance by Producer". The first paragraph of the Contract leaves

a space to be filled in with the name of the "undersigned" who is to be "hereinafter referred to as the 'producer'." Provision is made for indicating at this point whether the "producer" is owner, cash-tenant or managing share-tenant. The space provided for the signatures at the end of the Contract call for the signature of the owner "as owner" and of the managing share-tenant as "producer who is a managing share-tenant." It thus appears that the term "producer" is used somewhat loosely as applicable to the owner or the managing share-tenant as circumstances warrant, and as used in Part I setting forth the required "Performance" it may fairly be regarded as including both owner and tenant.

It is the general rule that when two or more persons assume the obligations of performance under the same contract they are jointly obligated for the entire performance unless the contrary is stated; and this is true even though the acts to be performed by one may differ from acts to be performed by the other. See Williston on Contracts (1920) Section 322. But when each is actually to perform a part only, the obligation may be limited to such part, even though the contract may be for some purposes entire. The most familiar example of this is a subscription contract. See Buster v. Fletcher, 22 Idaho, 172, 125 Pac. 226, 232 (1912); L.R.A. 1915 B, 224, 225. Such modifications of the general rule are based upon the nature of the transaction and the supposed intent of the parties. Williston, supra. In the subscription cases this construction is aided by the fact that the amount of the agreed contribution is separately set down against the name of each subscriber. There is no such apportionment of performance in the present case, and a determination that the obligation of the managing share-tenant is severable and goes to a part of the performance only must rest upon the intent of the parties, to be gathered from the Contract and the circumstances surrounding its execution.

Benefit Contracts such as this, entered into by the Secretary by virtue of the authority conferred upon him by Section 8 (1), have as their purpose the effectuation of the policy of the Act. It is the policy of the Act to control production in such a way as to raise the price of farm products and eliminate the disparity between the prices of agricultural and other commodities, thereby increasing the purchasing power of producers. Section 2, Agricultural Adjustment Act; and see Question 2 of "Questions and Answers Covering 1934 and 1935 Cotton Acreage Reduction Plan." The cotton reduction program contemplates that the benefit payments shall go to those who cooperate in the accomplishment of these objects. The cooperative nature of the program is stressed in "Questions and Answers." See paragraph 2, also question 2, question 5, question 8, question 9, and especially the following:

"Question 10. Will producers who sign contracts
to reduce their cotton acreage fare as
well as those who do not?

Answer: The Secretary of Agriculture intends that producers who sign contracts shall fare better than those who do not. All the powers granted under the Agricultural Adjustment Act will be used to accomplish this end. The rental and parity payments will go only to those who cooperate."

If the Contract is construed as one by which the owner and the managing share-tenant become joint promisors of the entire performance, each becomes in effect a guarantor of performance on the part of the other. Accordingly, a cooperating tenant, fully performing his obligations under the Contract as to all matters within his control, may be deprived of all benefits because of acts or omissions on the part of the non-cooperating owner as to land in no sense controlled by the tenant, and, furthermore, will be liable in damages to the government for any loss suffered because of such failures or omissions. Such a construction would not only result in needless hardships but would defeat pro tanto the purpose of the program and the declared intent of the government that those who cooperate shall fare better than those who do not.

We therefore conclude that the obligations of the managing share-tenant are limited to that portion of the required "Performance" which is within his power and control, and that from this is necessarily excluded the obligation (item 2 of "Performance") not to grow cotton on "land owned, operated, or controlled by him" insofar as that applies to land controlled by the owner and in no sense within the control of the tenant.

For the same reasons, we conclude that the performance of an item within the control of the owner alone, is not a condition precedent of the obligation of the government to pay the tenant. The rental and benefit payments which constitute the consideration to the "producer" are apportioned by the terms of the contract between the owner and the managing share-tenant. A divisible contract is thus indicated, and, upon the performance by one of the parties constituting a divisible part thereof, the government may be liable notwithstanding the fact that there has been a breach by the owner as to other portions.

(2)

The Secretary may, although making payment to the managing share-tenant, withhold payment from the owner who has breached the obligation not to grow cotton on other land owned by him.

If the Contract could be construed as in fact constituting two complete separate agreements, one between the Secretary and

the owner, and one between the Secretary and the tenant, the payment of the tenant could in no way affect the question of the Secretary's obligation to the owner. It is our opinion, however, that, although divisible for some purposes, the Contract is nevertheless entire for others. As has already been pointed out (p. 2, supra) the signatures of both owner and managing share-tenant were required upon all contracts covering farms operated by such tenants, so that there would have been no bargain whatever if the promise of either had been omitted. Hence the assent of the parties was given to the transaction as a whole, thus conforming to the test of a single as opposed to several contracts. See Williston (1920) Section 863. Since the owner and tenant are not joint promisors, however, the mere fact of a payment to the tenant operating as a discharge to the tenant as to a whole or a part of the contract, does not in itself operate as a release to the owner, whose right to payment must depend upon the performance of the particular obligations assumed by him.

Those obligations include the obligation to refrain from growing cotton on other land "owned, operated or controlled by him", as provided by Paragraph 2 of the Contract, and this has been interpreted to mean that he is obligated to enter into Reduction Contracts covering all such land. Administrative Ruling No. 19. The growing of cotton upon such other land, if not the mere failure to enter into Reduction Contracts with respect to it, therefore constitutes a breach of the Contract. Upon general legal principles, the owner, being in default, cannot recover.

The situation is not one in which recovery for partial performance should be allowed on equitable principles. That the owner has partially performed in all cases where the managing share-tenant performs fully, we think is clear. In exchange for his right to a fixed share of crops on the entire farm, he has, insofar as his contractual arrangements with the tenant permit, "rented" certain acres to the Secretary and has in any event consented to a reduction in the planted acreage. As regards these features of the Contract, his performance is complete, and, if the Contract were divisible as to such performance the Secretary would be liable to him pro tanto. In fact, however, the consideration for performance on the part of the owner is not apportioned as to any part thereof. The Secretary has bargained for entire performance of those obligations undertaken by the owner, and not for separate items at an agreed price per item. It is true that the party receiving the benefits of partial performance, even of an indivisible contract, is not always permitted to deny all obligation under the contract. This, however, applies only when there has been substantial performance carried out in good faith where it would be unjust for the other party voluntarily to accept and retain the benefits, merely because of some defects not going to the essentials of the contract. In the present case there are no equities to entitle the owner to the benefit of this rule. The Secretary receives no benefits which it would be unconscionable to permit him to retain. The failure, or

refusal, of the owner to enter into reduction contracts as to other land controlled by him, coupled with the growing of cotton thereon, is a wilful breach. As he has been advised, the entire contract is but a part of a program the success of which depends upon the participation of a high percentage of cotton growers, and the wholehearted cooperation of those participating. The obligation not to grow cotton on other land except as permitted under the terms of Paragraph 2 is, especially in the case of contracts signed by both an owner and managing share-tenant, an essential part of the obligation assumed, and the only part as to which the owner assumes an active duty.

On neither legal nor equitable grounds, therefore, is the non-cooperating owner, in default under the contract, entitled to payment, in whole or in part, of the consideration set forth in Part II.

(3)

The contract cannot be cancelled as to the owner alone.

Paragraph 9 provides that the producer shall

"Comply with the terms hereof and of all regulations or administrative rulings which have been or may hereafter be prescribed by the Secretary with reference to 1934 and 1935 Cotton Acreage Reduction Contracts, and any violation of said terms, regulations, rulings, or any material misstatement herein or in any information furnished by the producer shall be grounds for the cancellation of this contract by the Secretary. In the event of such cancellation, the producer shall repay to the Secretary any sums theretofore paid hereunder to the producer. The determination of the Secretary that any such violation or misstatement has occurred shall be final and conclusive."

Although divisible as to the obligations assumed by the owner and the tenant, as we have before stated, the Contract is for some purposes entire. The signatures of both were required before acceptance by the Secretary. It is therefore reasonable to assume that the cancellation of the contract as to one was intended to cancel the contract as to the other.

It is the general rule that unless a contract is clearly divisible, there can be no partial rescission, but "when separable into a number of elements or transactions, each of which is so far

independent of the others that it might stand or fall by itself, and good cause for rescission exists as to one of such portions, it may be rescinded and the remainder affirmed." Black on Rescission and Cancellation, Sections 583, 585. In the present case, notwithstanding the apportionment of consideration and the fact that the tenant may be entitled to payment for his several performance, there is a mutual dependency between the obligation of the owner and of the tenant which prevents a cancellation effective as to the owner only.

The present Contract, when entered into, in effect substituted a new agreement for the pre-existing contractual arrangements between owner and tenant as to the use of the land. Acres, which the tenant would otherwise be under obligation, or at least privileged, to cultivate were "rented" to the Secretary, and a reduction of production consented to and promised. The participation of the landlord in the new Contract, therefore, constituted a part of the consideration to the managing share-tenant, and vice-versa. This being so, it is not within the power of the Secretary to keep alive the Contract as to one and cancel it as to the other without their mutual consent. See Ehrman v. Rosenthal, (Cal.) 49 Pac. 460 (1897). Even with consent, the cancellation would in effect amount to the substitution of a new contract between the managing share-tenant and the Secretary for the present tri-partite agreement. As the cancellation would necessarily operate to terminate such contractual relations between the owner and tenant as are based upon this Contract, and would not automatically revive the pre-existing arrangements between them, the rights of the tenant to remain upon the land and operate the farm might well be one of great uncertainty, offering small assurance that he would be in a position to perform the obligations of the new agreement.

Neither the Contract itself, nor anything in the "Questions and Answers" prepared for the information of producers or in subsequent regulations or administrative rulings (which, by the terms of the Contract, are made a part of the Contract itself) indicates an intent to give a right of partial cancellation. Paragraph 9 provides merely that violations and material misstatements shall be grounds for the cancellation of "this contract." No explanation is given in "Questions and Answers" of the effect of breach on the part of the owner, but the following statement is made concerning the liability of an owner or landlord if the managing share-tenant fails to fulfill the terms of the Contract:

"Question 79. What is the liability of an owner or landlord if a managing share-tenant fails to fulfill the terms of the contract?

Answer: The contract is canceled, no further payments are made, and any payments which have been made to the owner or landlord must be returned to the Government, unless

the violation by the managing share-tenant was beyond the control of, and without the consent of, the owner or landlord."

The above indicates that where the default by the tenant was beyond the control of the landlord, the owner may retain the payments already made, although the entire contract is cancelled. This is consistent with the conclusion that where the owner is guilty of a breach the managing share-tenant who has performed is entitled to payment, but that, if the right to cancel is exercised by the Secretary on the ground of breach by either party, it must be exercised as to both.

(4).

The contract may not be cancelled as to 1934 and affirmed as to 1935.

By Paragraph 1, the producer agrees to

"reduce the acreage planted to cotton in 1935 on this farm by an amount not to exceed twenty-five percent (25%) below the base acreage, said amount, if any, to be prescribed by the Secretary and said number of acres is hereby rented to the Secretary for the year 1935 . . . This contract shall apply only for 1934 unless the Secretary shall, not later than December 1, 1934, proclaim his purpose of continuing the Cotton Acreage Reduction Plan for 1935."

By Paragraph 2 he agrees that he will

"not grow cotton during 1934 and 1935 on land owned, operated or controlled by him unless such land is covered by a 1934 and 1935 Cotton Acreage Reduction Contract."

Paragraph 10(b) provides that the Secretary shall

"In the event that he, in accordance with paragraph 1 hereof, prescribes any reduction in the acreage to be planted to cotton on this farm in 1935, make payments for the year 1935 similar to those described above, after presentation of such proof of performance as may be required."

By the terms of the Contract, not only is the Secretary required to make two payments within fixed dates in 1934, but these

payments are declared to be "for the year 1934", thus pointing to a completed transaction for the year 1934 wholly independent of any required reduction in 1935. This apparent complete independence of the Contract as to 1934 and as to 1935 is dispelled upon further examination. Paragraph 1 gives the Secretary an option to require the reduction of acreage planted to cotton in 1935, provided he proclaims, not later than December 1, 1934, his purpose of continuing the Reduction Plan for 1935. The mere fact that if he does so proclaim, he is bound to make rental and benefit payments at a given rate, supplies no element of consideration for the promise of the grower to keep his offer open. The consideration for this promise must be found in the "payments for the year 1934." It is the rule that when a contract binds a party by an absolute promise to pay for certain goods to be delivered or services to be rendered, and gives him an option to demand additional goods or services at an agreed price, "it is presumed that the absolute part of the contract contains a consideration for the giving of the option, and the party holding it can therefore enforce it." See Staples v. O'Neal, 64 Minn. 27, 65 N.W. 1083, 1084 (1896) (sale of logs to be delivered at agreed price, with option as to acceptance of additional logs at agreed price). So when a lease gives an option to purchase, the option is enforceable. Howratty v. Warren, 18 N.J. Eq. 124. Applying the rule to the present Contract, the payments to be made in 1934 must be presumed to include consideration for the continuing right of the Secretary to require reduction in 1935. Any other interpretation would make the option void for lack of consideration, and thus violate the rule that, where a contract is susceptible of two meanings, it should be construed in favor of mutuality and validity. See Thrall v. Newell, 19 Vt. 202, 203, 204; Minnesota Lumber Company v. Whitebreast Coal Co., 160 Ill. 85, 43 N.E. 774, 777 (1895).

Paragraph 9 provides specifically for cancellation of "this contract" upon any violation and provides further that, in the event of cancelation, the "producer shall repay to the Secretary any sums theretofore paid hereunder to the producer." Nothing in the language suggests the possibility of a partial cancelation. All payments paid prior to cancelation are recoverable, thus apparently including payments made in 1934 even though the breach occurs in 1935. As has been seen, "Questions and Answers" (Question 79) indicates that the owner may retain payments if he has been without fault, and presumably the managing share-tenant may do so in like case, but no distinction is suggested as between the amounts received by either in 1934 or 1935.

Concluding, as we do, that the payments due in 1934 include the consideration for the right of the Secretary to require reduction in 1935, and that cancelation, at least if made in 1934, goes to the entire Contract, it follows that the Secretary cannot cancel as to 1934 and stand upon his rights under the Contract as to 1935.

If cancelation is not resorted to, the Secretary, not being in default, will be in a position to require performance for 1935. In that event, if the owner performs fully in 1935, he will, in our opinion, be entitled to the payments provided for that year. The rule that a party who has not fully performed cannot recover for part performance does not apply to severable contracts. 6 R.C.L. Contracts, Section 351. As has been noted, the fact that the payments to be made by the Secretary are entitled "Payments for the year 1934" and "Payments for the year 1935," respectively, points to a divisible contract. This is confirmed by the distinct provisions made in 10(a) and 10(b) that payments shall be made "after presentation of such proof of performance as may be required," indicating that the consideration for 1935 is apportioned solely for performance in that year. This obligation includes the reduction of acreage on the farm covered by the contract, and also requires that the owner shall not grow cotton on other land controlled by him unless it is covered by a reduction contract. As to these two parts of the performance required in 1935, there is no apportionment of consideration. Both must be shown to entitle the owner to any payment in that year. If, therefore, the owner in 1935 grows cotton on other land controlled by him without having entered into a reduction contract with respect thereto, he will be in no position to enforce payment. If, however, the owner makes the necessary proof of performance in 1935, the fact that in 1934 he may have grown cotton on land not subject to a reduction contract will not warrant the Secretary in withholding payment for the year 1935.

Francis M. Shea,
Chief of Brief and Opinion Section,
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No. 111

SPHAGNUM MOSS AS AN "AGRICULTURAL
COMMODITY"

Sphagnum moss is an "agricultural commodity"
within the meaning of the Agricultural
Adjustment Act.

Opinion Section Memorandum No. 156
Dated August 8, 1934.

August 8, 1934

MEMORANDUM TO MR. PRESSMAN

QUESTION

Is sphagnum moss an agricultural or a non-agricultural commodity?

OPINION

I am of the opinion that sphagnum moss is an agricultural commodity.

DISCUSSION

Sphagnum moss is a bog-forming moss, the characteristic component of a variety of peat.

Peat is used chiefly as a fuel. It is obtained by excavation, which is usually considered a mining operation. The peat industry is ordinarily considered as in the jurisdiction of the Department of Mines, both in this country and abroad.

Sphagnum, before it is consolidated into peat, is used chiefly as a compost for the improvement of soils and as an absorbent packing used by horticulturists and poultrymen. During the war it served as an emergency substitute for absorbent cotton and was found to be in some respects superior to cotton. Sphagnum is gathered by hand.

Sphagnum bogs serve as an excellent soil for the growth of certain crops, particularly low shrubs such as cranberries, and the sphagnum is improved by the growth of such shrubs on it. Sphagnum bogs are cultivated by careful drainage, by removing forms of vegetation injurious to it, and by planting favorable vegetation. While the sphagnum industry has not been important enough to have been recognised as within the jurisdiction of any particular division of the Federal Government, it has been the subject of much study by Federal and State departments of agriculture and by agronomic associations in this country and abroad.

The Agricultural Adjustment Act nowhere defines the term "agricultural commodity", but it seems clear that the term must be construed broadly. Even within a narrow definition of the term, sphagnum moss must be considered an agricultural commodity.

If there be any doubt on this point, it is submitted that in view of the fact that the cultivation of sphagnum is intimately related to the cultivation of undoubted agricultural commodities and that sphagnum is used almost entirely for agricultural or horticultural purposes and as a substitute for an undoubted agricultural product, sphagnum moss ought to be considered an agricultural commodity so as to bring it within the jurisdiction of the Department of Agriculture.

Telford Taylor,
Acting Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 112

VARIATION OF PAYMENTS UNDER 1935

COTTON ACREAGE REDUCTION CONTRACTS

Under the terms of the 1934 and 1935 Cotton Acreage Reduction Contract the Secretary, in proclaiming his purpose of continuing reduction plan for 1935, may vary the specification of the amount to be paid and the ratio of distribution among the various persons holding an interest in the crop. However, he does so at the risk that he may not be able to enforce the contract for the year 1935 against producers refusing to abide by the contract so interpreted or amended. The Secretary may protect himself against this refusal to be bound by requiring that notice of such refusal must be given by a certain date.

Opinion Section Memorandum No. 166
Dated August 10, 1934.

August 10, 1934.

MEMORANDUM TO MR. HISSQUESTION

Can the Secretary of Agriculture vary the amount of rental, parity, or other payments, made under a 1934 Cotton Contract; and can he also change the ratio of distribution of such payments as between producers, share tenants, and share croppers?

OPINION

The Secretary of Agriculture may vary the amount to be paid and the ratio of distribution among the various persons holding interest in the crop in such manner as he may choose. However, he does so at the risk that some producers may refuse to abide by the 1934-35 contract for the year 1935 and that he may have no right of action against them. The Secretary may protect himself against this refusal to be bound by the contract by requiring that notice of such refusal must be given by a certain date.

DISCUSSION

The paragraphs of the 1934-35 contract which bear upon this opinion are paragraphs 1, 9, and 10 (b). The duties of the Secretary in reference to acreage reduction in 1935 are, according to the terms of the contract, that he shall make payments similar to those for 1934, if and when he calls for an acreage reduction for 1935, which can be no more than 25%. In other words, the Secretary need not make any payments in 1935, because he is under no duty to call for an acreage reduction. Therefore, if he chooses to enter into new contracts for the reduction of cotton acreage in 1935, there is no obligation in the present contract to prevent him.

The only difficulties with entering into a new contract are the administrative ones of having a new sign-up campaign. Therefore, it is desirable that the 1934 and 1935 cotton acreage reduction contracts be employed to avoid such a campaign, if modifications of their terms to conform to the new plan is legally possible.

Using paragraphs 1, 9, and 10 (b), it is believed that such a result as would avoid administrative difficulties may be achieved. To begin with, paragraph 10 (b) providing for payments similar to those made

in 1934 is so ambiguous as to require an administrative interpretation and a new definition of the understanding between the parties. Therefore, the Secretary might present his interpretation of the type of payment which he is required to make and hope to bind the producer thereby. However, the producer should have notice of the interpretation which it is proposed to employ and such notice as would give him sufficient time to dispute the interpretation. Therefore, it should be presented before the producer has performed his reduction in 1935. The difficulties of giving personal notice to each producer are avoided by the use of the provisions appearing at the end of paragraph 1, namely, "This contract shall apply only for 1934 unless the Secretary shall, not later than December 1, 1934, proclaim his purpose of continuing the Cotton Acreage Reduction Plan for 1935. This proclamation shall state the percentage of reduction which will be required hereunder for 1935. The Secretary shall not be required to give any notice to the producer other than public proclamation, which proclamation shall be given to the general press, and copies mailed to each county committee." This provision puts the producer under a duty to take notice of the terms of the proclamation described herein. This proclamation need not confine itself to merely stating the percentage of reduction which will be required, but should, in the course of events, describe the type of payments to be made, since at present their nature is ambiguous. Therefore, by employing the provisions of paragraph 1, the Secretary may put the producer on notice as to the change in terms of the contract.

If these new terms be within the present contract after judicial interpretation, then there is no difficulty in requiring such producers as refuse to perform to give notice thereof within a period of time, because the privilege of freeing themselves from the operation of the contract is granted them by the Secretary on condition that they give notice thereof. Otherwise, since the terms are within those provided for in the present contract, the producer is under his present duty to comply with them.

However, should the new terms offered by the Secretary be considered as calling for a new contract and not provided for by the present contract, it is believed that the producer still would be under a duty, after notice given by the proclamation, to notify the Secretary if he does not wish to be bound by them.

Though there is no judicial decision which might be cited as straightforward support for the proposition that where there has been a course of dealing between parties, an offer by one party to the other in reference to the subject matter of their dealings puts the recipient of such offer under a duty to speak or run the risk of being bound by the terms of the offer, there is judicial decision sufficiently proximate to this proposition to lead one reasonably to believe that in litigation the Secretary might succeed in sustaining this proposition.

The case offering strongest support for this proposition is found in Laredo National Bank v. Gordon, 61 Fed (2d) 906 (C.C.A. 5th 1932). The facts of that case were the plaintiff, an attorney, had undertaken to prosecute a suit on behalf of the defendant in re-

turn for which he was to receive a contingent fee of 25 percent of the amount recovered. While suit was pending, the defendant was about to reach a compromise with the opposing party in that suit. Apparently, there had been no agreement as to the fee to be paid in the event of a compromise. The defendant wrote the plaintiff asking him to state his minimum fee in case a compromise was reached. Plaintiff replied that the fee would be \$12,500.00. After the settlement by compromise, the defendant informed the plaintiff that the amount asked was excessive. A verdict was directed to the plaintiff in the sum he asked, and on appeal judgment was affirmed.

The defendant argued that their failure to reply to the offer of the plaintiff created no agreement to make any payment. The court said:

"It is true that, generally speaking, an offeree has a right to make no reply to offers, and hence that his silence is not to be construed as an acceptance. But, where the relation between the parties is such that the offerer is justified in expecting a reply or the offeree is under a duty to reply, the latter's silence will be regarded as an acceptance."

Further on the court continued:

"Its (the defendant's) silence amounted to conduct which misled its attorney to his detriment, for the bank (the defendant) could not have failed to know that Gordon was acting in the belief that the fee which he had agreed to accept would be paid without question."

This decision, though it may go further than others, is not an isolated one and has its source in the famous decision by Mr. Justice Holmes in Hobbs v. Massasoit Whip Co., 33 N. E. 495 (Mass., 1893). There have been cases going beyond the Hobbs case in which when no offer was made on the part of the defendant it was held that where someone already dealing with him ships goods, the defendant is under a duty to notify the shipper of his refusal to accept. Thus, in Royal Card and Paper Co. v. Dresdner Bank, 27 Fed. (2d) 791 (C.C.A. 2nd 1928), the court held as follows:

"It is assumed that the suits and furs were sent without any orders therefor having been placed by Baron. Plaintiff, (the setup in this case made the person, normally a defendant, a plaintiff) could accept or refuse to accept. Until accepted they remained the property of the seller, but in view of the course of dealing between the parties plaintiff was bound to indicate to the seller, * * * his intention to refuse them in order to effectuate his intention."

A similar decision has been arrived at in Wheeler v. Klaholt, 59 N.E. 756 (Mass. 1901) by Mr. Justice Holmes.

From this is concluded that a court may be convinced that the Secretary could impose a duty on producers to speak. Especially if the Secretary makes clear in the proclamation of which the producers will have actual or constructive notice that the success of the government's program depends upon the producers notifying the Secretary of their refusals to abide by the terms proposed. Thus a detriment to the Secretary may be made out, a detriment of which the producers had notice.

The duty upon the producer can be reinforced by a regulation requiring the producer to give notice to the Secretary if he refuses to be bound, and the producer has by the terms of paragraph 9 of this contract undertaken to abide by the prescribed regulations made in reference to it. Of course, a court may so construe this undertaking to be bound as to require that the regulations which would have this binding effect must be such as to come clearly within the terms of the present contract. And, therefore, if the new terms offered really, according to the court, constitute a new contract, then the producer is not bound by such regulations unless he be bound because they have the force and effect of law.

However, this is certain. Part of the benefit payments are sent to producers early in the summer and late in the Spring. It is clear law that if the producer should accept such payment he would be bound by the contract and by all its terms. Therefore, the Secretary can be sure by the beginning of July that he knows those who have agreed to the new terms proclaimed by him. To make certain of the binding effect of this first part payment, it is advisable that the check used in payment contain a statement, at the point where endorsements are to be made, giving notice to the payee that the payments are being made in accordance with the contract and terms proclaimed by the Secretary during the previous winter.

The fact that at the time cotton planting has begun the producers will be receiving their checks from the Secretary, the cashing of which will bind them to the 1935 contract, should offer sufficient practical assurance of a successful execution of the reduction program under these new contracts. Thus, though it be believed that as early as the beginning of 1935 all producers may be bound under one interpretation of the present contract and also under the rules and regulations there-of supported by case decisions on the necessity for a notice of refusal, one can be absolutely certain of a completed program by the time the checks are cashed.

Telford Taylor,
Acting Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 113

DELEGATION OF AUTHORITY TO TERMINATE
CONTRACTS

The Secretary may, by regulation, delegate authority to terminate 1934 and 1935 Cotton Acreage Reduction Contracts in cases of non-performance.

Such delegation of authority should be made to officers of the Agricultural Adjustment Administration (or to their respective representatives to whom they are authorized to re-delegate authority), to be exercised by them jointly or severally, and not to a committee as such.

August 13, 1934.

MEMORANDUM TO MR. McCONNAUGHEY
Acting Chief, Benefit Contract Section

In reply to your memorandum of July 30, 1934, I render my opinion upon the following:

QUESTION

May the Secretary of Agriculture delegate to a committee authority to terminate 1934 and 1935 cotton acreage reduction contracts in cases of non-performance? May the Secretary delegate to the chiefs of the respective commodity sections authority to cancel contracts, when such cancellation is requested in order to effect the execution of a new contract substituting new parties, no payments having been made under the contract, to reject offers prior to acceptance, and to pass upon requests by producers to withdraw offers prior to acceptance?

OPINION

The delegation of authority to terminate such contracts, when made by regulations issued by the Secretary, is permissible under the terms of the contract and under the terms of the Act. Such delegation of authority, however, should be made to officers of the Agricultural Adjustment Administration (or to their respective representatives to whom they are authorized to redelegate authority) to be exercised by them jointly or severally, and not to a committee as such. The other delegations proposed, if made in the same manner, are not objectionable.

DISCUSSION

(1)

Such delegation, if made by regulation or by administrative ruling, is permissible under the terms of the contract.

The contract makes no specific provision relating to termination except in section 9 which provides that

"any violation of said terms, regulations, rulings, or any material misstatement herein or in any information furnished by the producer shall be grounds

for the cancelation of this contract by the Secretary
* * *. The determination of the Secretary that any
such violation or misstatement has occurred shall be
final and conclusive."

It may be conceded that, under these terms standing alone, the cancellation of the contract for any of the reasons stated would require the personal action of the Secretary to at least the extent of giving the final approval. However, the first paragraph of the contract provides that the contract itself shall be

"Subject to such regulations or administrative rulings
(which shall be a part of the terms and conditions of
this contract) as have been heretofore or may hereafter
be prescribed by the Secretary relating to 1934-35
Cotton Acreage Reduction Contracts."

Undoubtedly, there may be limitations upon the proper scope of regulations even when provided for in such sweeping terms; it is not to be assumed, for example, that the parties to the contract intended by such provision that the Secretary should be privileged by regulation to change the consideration, or any similarly essential element of the bargain between them. But whatever the limitations which may exist, they can hardly be deemed to exclude the delegation of authority to determine when a violation or misstatement has occurred and to declare the contract terminated accordingly. Such delegation does not alter the bargain between the parties in any substantial sense; the standard for cancellation remains the same, and what is delegated is only authority to pass upon the existence or non-existence of facts constituting a violation of the standard.

Moreover, it is clear that the large number of contracts entered into would, in practice, preclude personal consideration by the Secretary in the individual case. Insofar as the execution of the contract is concerned, this fact is recognized in the provision made for signature. The printed signature of the Secretary is shown, as signing "for and on behalf of the United States", and a blank is left for the signature of the agent "by" whom he acts. In the "Instructions" issued in December 1933 (Form No. Cotton 5) it is stated that "acceptance by the Secretary will be made from Washington, D. C. on a special form for that purpose". This form bears a printed facsimile of the signature of the Secretary and leaves a space for the signature of the agent acting in his behalf.

It is my opinion, therefore, that the terms of the contract are consistent with a delegation of authority to cancel the contract for cause; and the course of dealing between the parties indicates that it was within their expectation that the Secretary in such matters should act through agents. As the contract by its terms, however, now calls for cancellation and determination "by the Secretary", and such action involves the exercise of discretion and is not wholly ministerial, the delegation of authority should be embodied in a regulation or administrative ruling to bring it clearly within the terms of the contract.

(2)

Such delegation, if made by regulation, is permissible under the Act.

In considering the validity of such delegation, we are not aided by any specific provisions in the Act relating to the mode of entering into or terminating such agreements. However, the problem of the Secretary's authority to delegate power to terminate such contracts is clearly akin to his authority to delegate his power to accept the same. In examining the phraseology of the Act it is to be noted that section 8 (2), which provides for marketing agreements, authorizes the Secretary

"to enter into marketing agreements"

whereas section 8 (1), which provides for benefit contracts, authorizes him

"to provide for reduction in acreage or reduction in production for market * * * through agreements with producers or by other voluntary methods * * *"

This difference in language suggests that it was contemplated by Congress that the participation required of the Secretary in the execution of reduction contracts need not be as direct and personal as that required in the case of marketing agreements. In the case of the latter he is authorized "to enter", in the other "to provide * * * through" agreements. While the power "to provide" for reduction through agreements is specifically vested in the Secretary, the power to execute and terminate such agreements is not.

Of the general authority of a public officer to delegate power, it has been said: (35 Op. Atty. Gen. 15, 19 (1925))

"There is, however, a distinction between powers conferred upon a public officer, which he may delegate to his subordinates, and powers which must be exercised by him personally. It has been said that the performance of a power requiring the exercise of judgment or discretion may not be delegated to another, unless the legislative authority conferring power has authorized the delegation." In re Murnane, 39 Fed. 99; Throop on Public Officers, section 570, et seq.

"Powers which may be delegated are often called 'ministerial,' and it has generally been held that the power is ministerial in character when its performance does not require the exercise of judgment or discretion. 29 Cyc. 1443; Mississippi v. Johnson, 4 Wall. 475; 598; Marbury v. Madison, 1 Cranch 137."

In the present situation, several factors operate to take the power to terminate contracts out of the class of non-delegable authority. These will be separately considered.

- (A) Authority to terminate reduction contracts, not being specifically vested in the Secretary by the Act, may be validly delegated.

A distinction is made between the situation which exists when a certain power involving discretion has been specifically vested in an officer, and when it is merely implied from other powers. In the first situation a power to delegate is thought to be negated by the indication of an intent to require the exercise of the officer's personal judgment or discretion.

Thus, when a statute provides for the payment of damages done to the property of officers when making a change of station, and authorizes and directs the Secretary of War "to examine, ascertain and determine" the value of the property damages, etc., and provides that his determination shall be final, the authority reposed in the Secretary is not delegable. 7 Comp. Gen. 518 (1928). Similarly a statute which provides that the travel expense incidental to a change in the station of an employee may be paid "when authorized by the head of the department" does not permit the allowance of a claim on the order of the Director of the Bureau of Investigation acting under authority attempted to be delegated by the Attorney General. 7 Comp. Gen. 832 (1928). The strictness of this interpretation is the more evident in view of the provisions of Rev. Stat. section 360 providing that the Attorney General may require "any officer of the Department of Justice to perform any duty required of the department, or any officer thereof". Of this, the Comptroller said: (p. 833)

"Section 360, Revised Statutes, quoted in your letter, has reference to the duties that may be required of different officers of the Department of Justice but does not authorize the Attorney General to confer upon any subordinate the right to exercise discretion specifically vested in him by statute. While said section confers authority to require one subordinate to perform the duties ordinarily required of another it does not confer authority to designate generally an officer or an employee of the department to act, instead of the Attorney General, as the head of the department."

Then, as in the present case, the delegated power is not specifically vested in the officer but is one necessarily implied as necessary in carrying out a power specifically vested, more liberal rules apply. This is true even when the power is discretionary in character. Thus, when a statute provides in general terms that the Director of the Geological Survey "shall have the direction of the Geological Survey", the director may authorize the chief of a field party to employ such assistants as may be necessary in carrying out the work he is required to perform. 13 Comp. Dec. 807 (1907). The Comptroller stated: (p. 810)

"If all officers of the Government were required to perform in person every act requiring the exercise of discretion as to time, manner, or expediency of the particular act, it would be impracticable to carry on the vast business of the Government. There are many duties devolved upon the President and the heads of Departments and Bureaus, which, by the multiplicity and importance of other duties with which they are charged, or of the magnitude of the work, or of the peculiar knowledge or skill required, can not be performed by them personally. In such case it has always been held that the President or the head of a Department has authority to require such duties to be performed by subordinate officers, or in some cases where such duties require services not within the line of duty of any inferior officer provided by law, to employ suitable agents to perform the required services, as an appropriate means of executing the duty devolved upon him. (United States v. Macdaniel, 7 Pet. 1; United States v. Ripley, id., 18; United States v. Fillebrown, id., 28; Gratiot v. United States, 15 id., 336; Converse v. United States, 21 How., 463; United States v. Brindle, 110 U.S. 688.)"

This discussion is to be compared with 4 Comp. Gen. 675 (1925) in which it was stated that, since the power to appoint employees in the executive departments is vested in the head of the department, in the absence of specific statutory authority it may not be delegated to a subordinate. It was decided, however, that temporary employees engaged under the authority of the special statute in question, authorizing the President to aid in the suppression of the bubonic plague in case of epidemic were not officers or employees in the Public Health Service, and therefore could be appointed in any manner prescribed by the President.

A power not specifically vested in the head of a department may, however, be of such a nature that it will be deemed to require personal exercise by him. This has been held in the case of bounty land certificates to be issued "from the Department of the Interior". 7 Op. Atty. Gen. 594 (1855). It was stated that "such phraseology in the statutes usually implies attestation by the Head of the Department", although in this case a special statute authorized signature by the Commissioner also. It was pointed out in the opinion that the certificate was in the nature of an evidence of property which may pass by assignment and that therefore no procedure not assured of validity should be permitted. The Attorney General therefore advised that

"If the time occupied in signing the bounty land warrants by the Commissioner has become a serious impediment to the prompt performance of his merely intellectual duties, relief should be obtained from Congress."

There is nothing in the termination of a contract according to its terms which operates to bring it within the category of non-delegable powers recognized in the opinion of the Attorney General just cited. The great number of government contracts necessarily requires that authority to bind the government be in many cases delegated to subordinates by administrative officers acting in the discharge of statutory duties. Such delegation in the absence of any statutory provision to the contrary, is a common practice and is recognized by the accounting officers of the government as illustrated in 13 Comp. Dec. 807, supra. For these reasons alone and apart from other special provisions in the Act, it appears that a delegation of authority to terminate reduction contracts according to their terms is permissible under the Act.

- (B) The power to make regulations includes the power to delegate authority to exercise discretionary powers, even although such powers would otherwise require the personal action of the Secretary.

By section 10 (c) of the Agricultural Adjustment Act the Secretary is authorized

"with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title * * *"

The effect of such a provision upon authority to delegate power, even when the power is one specifically vested in a certain officer, is vividly illustrated in 7 Comp. Gen. 656 (1928). The doctrine of the decision is that the power to make regulations concerning official actions includes the power to delegate authority in respect to such actions.

The statute in question (36 Stat. 1265) was one similar to that involved in 7 Comp. Gen. 832, supra, permitting the payment of an employee's expenses in a transfer of station "when authorized by the head of the department". It was confined in its application, however, to the Department of Agriculture and permitted the allowance, "under such rules and regulations as may be prescribed by the Secretary of Agriculture", of expenses incurred in transfers of employees, "when authorized by the Secretary of Agriculture". The results under the two statutes are thus distinguished:

"While it has been held that the act of December 22, 1927, is applicable only to transfers in which the authority therefore was signed in person by the head or assistant head of the department or establishment and that the authority to so sign could not be delegated, such ruling is not applicable to transfers in the Department of Agriculture authorized under the act of March 4, 1911, supra, as the delegation of authority under that act is considered included in the statutory authority to provide for such transfers by regulation." (at p. 658)

If the Secretary's authority to issue regulations extends to such matters as the acceptance and termination of contracts, the delegation of authority to subordinates to act in respect thereto must, upon parity of reasoning, be valid. No limitation is placed by the Act upon the scope of his authority to issue regulations, and, as the termination of contracts is merely one of the manifold administrative operations necessary in carrying out the functions vested in him by the Act, no ground exists upon which to rest an implied exception.

(3)

Such delegation should be made to officers individually, to be exercised jointly or severally, and not to a committee as such.

Some question may be raised as to the authority of the Secretary to delegate authority to terminate contracts to a committee. The memorandum of May 16, 1934, setting forth the authority and procedure of the Committee on Termination states that

"It is understood that the Committee will continue to comprise the Comptroller, the General Counsel, and the chief of each of the Commodity Sections having a benefit contract as an element of its existing program, and it is proposed that these individuals acting under the authority delegated to them by the Secretary will personally exercise that authority in ultimate decisions of the Committee. It is understood, however, that each of these individuals has written authority to redelegate his authority, which redelegation will be limited, as a matter of practice to the delegation of authority to carry out administrative details under their general supervision and prepare cancellation cases for the ultimate action of those primarily delegated by the Secretary to effectuate termination."

It further appears that the committee will meet regularly, and at special meetings to be called by the chairman, to act upon recommendations for cancellation. Contracts which are cancelled will be stamped "cancelled" and signed by the representative of the committee of the commodity section concerned with the contract in question.

In this procedure the actual determination to cancel, based on the recommendations and facts submitted, is an act of a discretionary character, and one therefore appropriately exercised only by officers of the government. It is evident that the committee, as such, has no recognized status under the Act, and, it would appear therefore that the validity of its actions must depend upon the authority and status of the individuals who compose it. The plan, as understood, is open to the objection that it does not delegate authority to individuals authorized to act jointly or severally, but to committee action, presumably subject to majority rule. It is my opinion that while it may be desirable to have such matters made the subject of committee consideration, the actual authority to

determine should be vested, not in a committee as such, but in particular officers, to be exercised jointly or severally, or subject to the provision that the action of any one, in conjunction with that of any others who may be specified, shall suffice.

The delegation of authority to the chiefs of the commodity sections to act directly in the other situations mentioned presents no new problems and is therefore permissible. It is understood that the power conferred upon them to redelegate extends only to matters of administrative detail and not to ultimate action upon offers or contracts.

Telford Taylor,
Acting Chief, Brief and Opinion Section,
Office of the General Counsel.

NO. 114

USE OF JONES-CONNALLY (CATTLE) ACT

FUNDS FOR PROCESSING FOR RELIEF

PURPOSES

Funds appropriated under Sections 2 and 6 of the Jones-Connally (Cattle) Act and advanced to the Federal Surplus Relief Corporation by the Secretary of Agriculture for the purchase of dairy products may be legally expended by the Corporation for such processing as is necessarily entailed in preparing such products for relief distribution.

Opinion Section Memorandum No. 164
Dated August 13, 1934.

August 13, 1934

MEMORANDUM TO MR. PHILIP G. MURPHY
Chief, Commodities Purchase Section

In response to your inquiry of July 28, 1934, addressed to Mr. John P. Wenchel, Acting General Counsel, I submit my opinion upon the following:

QUESTION

May the funds appropriated under either section 2 or section 6 of the Jones-Connally Cattle Act (Pub. No. 142 - 73d Congress) be legally expended by the Federal Surplus Relief Corporation for the processing of dairy products purchased by it in bulk from the producer?

OPINION

Funds appropriated under sections 2 and 6 of the Jones-Connally Cattle Act (Pub. No. 142 - 73d Congress) and advanced to the Federal Surplus Relief Corporation by the Secretary of Agriculture for the purchase of dairy products may be legally expended by the corporation for such processing as is necessarily entailed in preparing such products for relief distribution.

DISCUSSION

The specific inquiry is concerned with the legality of expenditure of money from either of these funds for payment of charges for processing and packaging butter or cheese originally purchased in bulk form and intended for relief distribution. Your inquiry states that the Federal Surplus Relief Corporation at the present time feels itself unable to expend ordinary funds for processing. It is assumed in this opinion that proper distribution of butter and cheese for relief requires that these products be in suitable small packages or containers.

Section 2, Public No. 142 - 73d Congress, reads as follows:

"SEC. 2. Subsection (a) of section 12 of the Agricultural Adjustment Act, as amended, is amended by adding at the end thereof a new paragraph as follows:

"To enable the Secretary of Agriculture to finance, under such terms and conditions as he may

prescribe, surplus reductions and production adjustments with respect to the dairy- and beef-cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the markets for the dairy and beef cattle industries, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$200,000,000: Provided, That not more than 60 per centum of such amount shall be used for either of such industries."

Section 6, Public No. 142 - 73d Congress, reads as follows:

"SEC. 6. There is authorized to be appropriated the sum of \$50,000,000 to enable the Secretary of Agriculture to make advances to the Federal Surplus Relief Corporation for the purchase of dairy and beef products for distribution for relief purposes, and to enable the Secretary of Agriculture, under rules and regulations to be promulgated by him and upon such terms as he may prescribe, to eliminate diseased dairy and beef cattle, including cattle suffering from tuberculosis or Bangs' disease, and to make payments to owners with respect thereto."

Pursuant to the authority contained in the above amendments to the Agricultural Adjustment Act, Public Resolution No. 27 - 73d Congress (H.J. Res. 345), appropriated the sums provided. It reads:

"To enable the Secretary of Agriculture to carry out the purposes of the Act entitled 'An Act to amend the Agricultural Adjustment Act so as to include cattle and other products as basic agricultural commodities, and for other purposes' (Public, Numbered 142, Seventy-third Congress), approved April 7, 1934, there are hereby appropriated, out of any money in the Treasury not otherwise appropriated, pursuant to the authorizations contained in sections 2 and 6 of said Act of April 7, 1934, \$100,000,000 for the purposes of the Agricultural Adjustment Act, as amended, and \$50,000,000 for the purposes specified in section 6 of said Act of April 7, 1934, including the employment of persons and means in the District of Columbia and elsewhere and other necessary expenses; in all, \$150,000,000, to remain available until December 31, 1935."

Sections 2 and 6 of the Jones-Connally Cattle Act are distinguishable in purpose. Section 2 is, by the express language of the appropriation, confined to the purposes of the Agricultural Adjustment Act, and to the purposes indicated by the language of the section. Section 6 stands

by itself as an outright appropriation for the purposes of relief and for the purposes of benefiting the dairy industry.

It is my opinion, however, that appropriations made pursuant to either of these sections may validly be used for the purpose of processing commodities in order to facilitate their distribution for relief purposes. Funds are made available under section 2 for, among other purposes, "surplus reductions". The purchase of butter or cheese is therefore authorized where such purchase is made in order to reduce a surplus of these commodities. And authority to make such purchases carries with it as a necessary incident the power to make such disposition of the surplus commodities purchased as will conduce to or, at least, be not inconsistent with, the purpose of the purchase. Distribution of the commodities for relief purposes clearly fulfills these requirements, since there is very little chance, if the surplus commodities are distributed in small units adapted for individual consumption, that they will be marketed by the distributees and again help to create a surplus. If, as is assumed in this opinion, distribution for relief purposes cannot be made unless the butter or cheese is properly packed in small containers, and if distribution in larger units would increase the chance of a re-marketing of the butter or cheese and a consequent recurrence of surplus of such commodities, the authority to use funds under section 2 of the Cattle Bill available for "surplus reductions" for processing the purchased surplus commodities in order to distribute them for relief purposes seems apparent.

The availability of funds appropriated under section 6 of the Act is even clearer. These funds are expressly made available

"to enable the Secretary of Agriculture to make advances to the Federal Surplus Relief Corporation for the purchase of dairy and beef products for distribution for relief purposes * * *"

Again, if it is assumed that processing butter or cheese into small units is essential or convenient to a relief distribution program, the funds must be available to pay the expense of such processing.

There remains the question whether the Federal Surplus Relief Corporation is legally authorized to use money advanced by the Secretary of Agriculture under section 2 or section 6 of the Jones-Connally Cattle Act for processing dairy products purchased by it from producers. The Federal Surplus Relief Corporation was incorporated in Delaware on October 4, 1933, as a non-profit, non-stock corporation. The nature of its business and objects or purposes to be transacted as indicated in article third (a) and (b) of its amended Certificate of Incorporation are as follows:

- "(a) To relieve the existing National Economic emergency by the expansion of markets for the removal of, and increasing and improving the distribution of agricultural and other commodities and products thereof;
- "(b) To purchase, store, handle and process surplus agricultural and other commodities and products thereof, and to dispose of the same, so as to relieve the

hardship and suffering caused by unemployment, and/or to adjust the severe disparity between prices of agricultural commodities and products thereof."
(Italics supplied)

It is therefore evident that the power of the Federal Surplus Relief Corporation, referred to in section 6 of the Jones-Connally Act, includes specifically the power to process surplus "agricultural and other commodities and products thereof".

I conclude, therefore, that funds appropriated under sections 2 and 6 of the Jones-Connally Act may be legally expended in the processing of surplus agricultural commodities for relief distribution.

Telford Taylor,
Acting Chief, Opinion Section,
Office of the General Counsel.

No. 115

SETTING UP RESERVE FUND UNDER
MILK LICENSE

A proposed provision in a milk license for deductions from payments to producers to be used as a reserve fund against failure or delay of distributors to make payments, which provides for the distribution of the excess balance of such reserve fund among producers, is valid provided the Market Administrator is required to distribute the excess in a way approximately proportional to the deductions made on account of various producers.

Opinion Section Memorandum No. 165
Dated August 14, 1934.

August 14, 1934.

MEMORANDUM TO MR. PRESSMAN

Replying to your question of the legality of the following provision which it is proposed to insert in the milk license:

"8. The Market Administrator may deduct from the total amount computed pursuant to subdivision (a) of paragraph 4 an amount suitable for the maintenance of a reserve fund against the failure or delay of distributors to make payments on adjustment accounts as provided in paragraph 7. Whenever the Market Administrator has a balance on hand in excess of such necessary reserve, he may add such amount or any part thereof to the total value of milk for any delivery period computed pursuant to subdivision (a) of paragraph 4. Any error in computation of payments or any discrepancies in reports of distributors or in the adjustment accounts shall be adjusted when settlements are made with respect to the following delivery period. All such funds shall be kept separate by the Market Administrator and shall in no event be used by him to meet any costs or liabilities incurred by him under this License."

OPINION

The plan of setting up a reserve fund to take care of failure or delay in payment by distributors to the adjustment account is valid. However, it is suggested that the provision appearing in the second sentence not permit the Market Administrator to distribute the excess in the reserve fund in any other way than such as would be approximately proportional to the payments made into the fund from the accounts of various producers.

DISCUSSION

The plan defined in the provision above is an insurance system by which it is proposed to prevent variability in the monthly payments out of the adjustment fund because of failure on the part of the distributors to make their contribution. This system operates to the benefit of the very group of producers from whom payments are being withheld. However, the amount taken off the account of one producer may not be equivalent to the amount which will be disbursed to him from this reserve fund.

Yet, even if it were to be assumed that the producer has a property right in the receipts of the adjustment fund which the license could not abolish, the insurance system proposed would not be an unconstitutional taking of the producer's property.

In Noble State Bank v. Haskell, 219 U.S. 104 (1911) it was held that there was no lack of due process when banks were assessed for payments into an insurance fund from which depositors in banks which had failed were reimbursed. The litigating bank claimed that the assessments constituted a taking of its property for private use and therefore was unconstitutional. The court, speaking through Mr. Justice Holmes, states that there was nothing invalid about taking funds from one bank to be used for the benefit of depositors of another because such a system benefited the banking system as a whole through the greater confidence in banks which resulted. Namely, it was the position of the court that it was proper to assess some members participating in the banking field for payments to other participants since the banking system itself would be benefited. Therefore, if the license itself be valid, then the present provision is also valid and there is no peculiar constitutional defect in the reserve fund provision because of the changes in the distribution of adjustment funds.

Furthermore, there seems to be no reason to believe that any producer has a vested constitutional right to the payments made out of the adjustment fund raised by the assessments. These payments are made to the producer only because of the terms of the license and if the Secretary had promulgated a license which made assessments upon the distributors and did not provide for distribution of funds to the producers, it is difficult to see how the various producers could show that they had a right to the receipts from such assessments. Therefore any variation of the scheme of payment, such as the present reserve fund proposal would be valid.

The provision in the second sentence which would permit the Market Administrator, when he found that he had an excess of the reserve, to pay it out to producers not in proportion to the payment into the reserve fund but in a manner which is apparently arbitrary, would weaken the position of the supporters of the reserve fund provision. For if they had to rely upon the case of Noble State Bank v. Haskell, supra, the fact that payment can be made from the excess reserve fund in an arbitrary manner without reference to the general scheme of the adjustment fund would not permit one to say as was said in the Noble State Bank case that the whole scheme of the reserve fund was for the benefit of the adjustment plan. Therefore, it is suggested that the provision for payments of excess be so drafted as to require something approximating a proportional repayment in terms of the original contributions obtained indirectly from distributors.

Telford Taylor,
Acting Chief of Brief and Opinion Section,
Office of the General Counsel.

No. 116

PROCEEDINGS FOR REVOCATION OF LICENSE
FOR VIOLATIONS PRIOR TO TRANSFER OF
BUSINESS

When a person against whom proceedings have been instituted for the revocation of a license transfers the assets of his business to a natural person and retains such interest and control that the transferee in continuing the business is in effect a mere agent, the transferor is still "engaged in the business" within the meaning of Section 8(3), and his license may be revoked.

When the transfer is made to a corporation, in such manner that the corporation thereafter functions as a mere instrumentality or alter ego of the transferor, and when the purpose of such transfer is to circumvent the statute, the result will be the same; but when the transfer is complete and is made in good faith, the corporation will be recognized as the licensee "engaged in the handling," and the former owner may continue to act as its agent under the protection of its license.

If the transferee (whether a natural person or a corporation) in continuing the business does so as a free agent, and is within the class of persons to whom a license is issued, he must be regarded as operating under a license personal to himself. Such license may not be revoked for violations, occurring prior to the transfer, of the license previously issued to the transferor.

Transferees who may not be subject to revocation of license because not independently engaged in the business, may nevertheless, if acting as the agents of, or in collusion with the transferors, be subject to restraint or penalty through other forms of proceedings.

August 14, 1934

MEMORANDUM TO MR. J. H. LEWIN, CHIEF,
ADMINISTRATIVE ENFORCEMENT SECTION

This is in reply to your memorandum of June 6, 1934, in which you set forth the enforcement problem which arises when a licensee, against whom proceedings have been instituted for revocation of license or whose license has already been revoked, transfers all of the assets of his business to some other entity. In the following opinion, for the purpose of indicating probable legal results, I have treated proceedings against transferors and proceedings against transferees separately. It is of course not intended to suggest that, although there can be but one licensee for a business other than a partnership, it may not be advisable as a matter of procedure, in case of doubt as to the completeness and good faith of a transfer, to combine proceedings against both the transferor and the transferee, naming both as licensees, and putting upon them the burden of establishing as a defense that the relation of either or both is that of a mere agent of the true principal.

QUESTION

When a person against whom proceedings have been instituted for the revocation of a license issued pursuant to Section 8 (3) of the Agricultural Adjustment Act, transfers the assets of his business to another entity, under what circumstances may revocation proceedings, based upon violations prior to the transfer, be had (1) against the transferor, and (2) the transferee?

OPINION

I. Who Are Licensees Under Section 8(3)

Licensees, under Section 8 (3), include only those engaged as principals or independent contractors, in the handling of agricultural commodities, etc., and do not include their subordinate agents and employees.

II. Proceedings Against Transferors

- (1) When the transfer is made to a natural person and the transferor retains such interest and control that the transferee in continuing the business is in effect the mere agent of the transferor, the transferor is still "engaged in the handling" of the commodity within the meaning of Section 8 (3). His license may therefore still be revoked.
- (2) When the transfer is made to a corporation, in such manner that the corporation thereafter functions as a mere instrumentality or alter ego of the transferor, and when the purpose of such transfer is to circumvent the statute, the result will be the same; but when the transfer is complete and is made in good faith, the corporation will be recognized as the licensee "engaged in the handling," and the former owner may continue to act as its agent under the protection of its license.

III. Proceedings Against Transferees

- (1) If the transferee (whether a natural person or a corporation) in continuing the business does so as a free agent, and is within the class of persons to whom a license is issued, he must be regarded as operating under a license personal to himself. Such license may not be revoked for violations, occurring prior to the transfer, of the license previously issued to the transferor.
- (2) Transferees who may not be subject to revocation of license because not independently engaged in the business, may nevertheless, if acting as the agents of, or in collusion with the transferors, be subject to restraint or penalty through other forms of proceedings.

DISCUSSION

As it is clear that only persons to whom licenses have been issued are subject to a revocation of license, it is desirable to determine at the outset whether the class of persons eligible to licensing under Section 8 (3) includes all those in any way occupied about the business or only the proprietors who engage in the business in the capacity of independent contractors.

Cases arising under licensing statutes recognize a distinction between the licensing of the pursuit of a particular occupation and license requirements imposed upon the conduct of a business, and the phrase "engaged in the business" is understood to embrace the element of ownership.

Thus, in Derrick v. Commonwealth, 122 Va. 906, 95 S.E. 392 (1918), it was held that under a statute imposing a license tax on any person or firm "who shall * * * engage in the business of civil * * * engineering," civil engineers exclusively employed by a railroad company in the capacity of employees and not as independent contractors, were not engaged in the business of engineering so as to render them liable to the tax. Pointing to the fact that the statute also provided a tax on "every person, firm, * * * engaged in the business of a merchant," the court commented:

"No one would contend that a salesman employed by a merchant, having no other interest or connection with the business, was engaged in the business of a merchant, within the meaning of the statute."

After declaring that "it must be a person's own business in which he is engaged, in order to subject him to the tax," the court said: (p. 394)

"It is true that the mere fact that one is employed by another does not furnish a valid test of whether the former is or is not engaged in his own business * * * . When one is employed by another, the true test of whether the former is engaged in his own business, or the business of the latter, is the character of the employment. Is the former an independent contractor, and as such in the employment of another and doing work for such other; or is the former a mere servant or ordinary employee of another?"

In the same manner a statute providing for the licensing of "every person who engages in the business of buying or selling"

junk does not require that each employee in the dealer's shop or on his wagons who may make a purchase or sale of junk shall take out a license before so doing. State v. Rosenbaum, 68 Atl. 250 (1907). The statute in question provided for the keeping of a record of purchases or "book", and for displaying the name of the person conducting the business on all his wagons. In construing the statute, the court said:

"A dealer is one whose business it is to buy and sell as a merchant, shopkeeper, or broker-- a trader. Century Dictionary. A trader is one who makes it his business to buy merchandise, goods, or chattels to sell the same at a profit. Bouvier, Law Dictionary. The statute in question contemplates that the licensed dealer will or may act through agents in the conduct of his business, and it provides that he shall display upon every wagon or other vehicle used by him in such business the number of the license under which said business is being conducted and the name of the town where such license was granted. It does not intend that each employee in his shop or upon his wagons along the highways who may make a purchase or sale of junk shall take out a license before so doing. They are not dealers or traders within the intent of the law." (p. 251)

Under an ordinance requiring every person "who shall deal in the selling" of various wares to take out a license as a merchant, the local manager of the Standard Oil Co., making sales of gas from local storage tanks, is not liable either as being himself an unlicensed merchant, or, as agent, for the failure of the corporation itself as a merchant to take out the required license. To come within the provision of the statute, the dealer must own the business, whether it be that of selling purchased wares for profit or consigned wares on commission. City of Troy v. Harris, 76 S.W. 662 (1903).

In Alabama some cases have apparently accepted the theory that "to engage in, or carry on business" signifies no more than "that which engages the time, attention and labor of men," and does not require any pecuniary interest in the business. Abel v. State, 90 Ala. 631, 8 So. 760 (1891); Dentler v. State, 112 Ala. 70, 20 So. 592 (1896). In these cases, however, the proprietor of the business had failed to take out a license, and the court seems to have confused the issue with that presented by aiding and abetting a principal in carrying on a business unlawful per

se without a license. See Segars v. State, 88 Ala. 144, 7 So. 46 (1889); Bowen v. State, 131 Ala. 39, 31 So. 79

The question of determining who is required to be licensed, under the terms of a statute or ordinance, is of course distinct from that of the possible liability of an agent for activities while in the employ of a principal subject to the requirement of a license. The liability of an agent is thus discussed in City of Cartersville v. Gibson, 168 S.W. 673 (1914).

"I understand the law to be, in the absence of some specific law to the contrary, that no agent of another, who is conducting a lawful business within itself, is personally responsible for the acts of the principal. If that was not true, then every clerk in every mercantile establishment in the state, and those of all railroads, telegraph and telephone companies, would be personally liable for working for them, if perchance they had not taken out their occupation license, which, as a rule, is trivial in amount. But not so in a class of business which within itself is unlawful, such as gambling, the sale of intoxicating liquors, or any other public nuisance. There the license legalizes the business, and until the principal has been legally authorized to sell intoxicating liquors, neither he nor his employers can lawfully so do, for the simple reason that one person cannot lawfully authorize another to do a thing which he himself cannot lawfully do. But that rule does not apply to any business which may be lawfully conducted where no law or ordinance prohibits it. In such cases, if a statute or ordinance imposes an occupation tax, then the principal must procure the license, and he alone is responsible for failure to so do, and not his clerks, or agents. The occupation tax does not make the business itself unlawful, but requires the person conducting it to take out the license or to pay the tax, and if he fails so to do, he may be punished for failure to so do, but not because his business is unlawful, like the sale of liquor." (p. 674)

It is my opinion that "engaged in the handling," in Section 8 (3) of the Agricultural Adjustment Act, is used in the same sense as the terms engaged in, or engaged in the carrying on, or conduct of, a business in numerous license statutes and ordinances intended to apply only to the person (or entity) responsible, as an independent contractor, for the operation of the business. A contrary interpretation, applying the licensing provision to employees and agents, would lead to absurd results. By Section 8 (2) of the Act the Secretary is authorized to enter into marketing agreements with persons "engaged in the handling" of agricultural commodities, and the parties to such agreements are made eligible for loans from the Reconstruction Finance Corporation. Clearly these terms, as thus employed, can include only persons able to control the operations of the business. By Section 8 (4) the Secretary is authorized to require any "licensee" to forward reports as to commodities bought and sold, and as to trade practices and charges, and to keep such systems of accounts as may be necessary. Again, the proprietor of the business must be meant, and not his bookkeepers and clerks. It is, moreover, apparent that the whole license scheme is one designed to regulate, not the personal pursuit of an occupation, but the conduct of a business by those ultimately responsible for the same.

Since, therefore, only the person engaged in the business as its proprietor and as an independent contractor can be a licensee, when there is a purported transfer of the business, either the transferor or the transferee must be the licensee. Both cannot be, unless the terms of the transfer are such as to constitute them partners in the business. If, notwithstanding the purported transfer, the original licensee continues to be the actual principal, he is still subject to revocation of license for violations occurring before or after the purported transfer, or, if his license has already been revoked, to the penalty provided for engaging in the handling without a license as required by the Secretary. It remains to determine under what circumstances he may be treated as a principal despite the transfer.

II. Proceedings Against Transferors

(1)

When the transfer is made to a natural person and the transferor retains such interest and control that the transferee in continuing the business is in effect the mere agent of the transferor, the transferor is still "engaged in the handling" within the meaning of Section 8 (3). His license may therefore be revoked.

That a licensee may sell out his business at any time, and

transfer its assets to another, is not disputed. Moreover, if he parts with his entire interest, it is difficult to see how the transfer can be tainted with bad faith or an intent to evade the statute, even though revocation proceedings may have been instituted against him and may have culminated in a revocation of license.

The statute does not demand the termination or forfeiture of the business. It demands only that the licensee who has violated the terms and conditions of his license shall forfeit the privilege of engaging in the handling of the commodity in question, and provides that if he continues so to engage he may be fined for the offense. The sale of the business, therefore, is as likely to be a sign of submission to, as of attempt to evade, the statute. When, however, after revocation proceedings and after a sale of the business, the original licensee continues as an actor in its operations, a just suspicion may arise as to the nature of his relation to the business. The question whether the revocation proceedings should be continued against him, or, if they are already consummated, whether he is subject to the penalty provided for engaging in handling without a license will then depend upon this relationship. If he is still the principal, it cannot matter what device is used to give the appearance that he is an agent or employee only.

In Kimmins v. City of Montrose, (Cal.) 151 Pac. 434 (1915), in the prosecution of a professional auctioneer for conducting a sale without a license, it was held that the defense that he was acting only as an agent, being in the nature of a plea of confession and avoidance, must be proved by the defendant by a preponderance of the evidence. The defendant in this case had advertised the sale in his own name, to be held at "the old stand," and had actually held the sale at his usual place of business, where he occupied the auction stand and cried the sales. The instructions given by the trial court are illuminating: (p. 435-6)

"The court told the jury that the city was required to prove its case by a preponderance of the evidence; that defendant set up the defense that he conducted the auction as the agent and under the immediate control and direction of Rymal, who had an auctioneer's license; that a licensed auctioneer need not make all the sales in person, but may employ necessary clerks and servants, have them use the hammer, make the outcry, and make all necessary arrangements for the sale; that this must be done under the licensed auctioneer's immediate direction and supervision; that the licensed auctioneer having the sale need not be actually present during the whole time of the sale, and that an occasional absence would not of itself subject the servant,

employee, or assistant to the penalties of the ordinance; that if the jury found from the evidence that Rymal was a licensed auctioneer, and defendant was acting as his servant or assistant in making the sale and arranging therefor, and acted under the supervision of Rymal, they should find him not guilty; that the burden of proof was upon defendant to establish such defense by a preponderance of the evidence; that, before such a defense could be availing to the defendant, the jury must find by a preponderance of the evidence on the trial that defendant acted as the agent of Rymal under the latter's ^{made} direction and control; that such defense must be ^{made} in good faith, and not for the purpose of evading the law; that if the jury found from the evidence on the trial that the defendant procured Rymal to act as the chief auctioneer at the sale for a part of the time, for the purpose of evading the payment of a license fee, it should disregard such defense; that the penalty for violating the ordinance is a fine of from 1 cent to \$50."

The liquor license cases, although involving as a rule, factors not present in the licensing of businesses not equally subject to the police power, furnish helpful precedents on problem of determining relationship to the business. When a license is required for engaging in the business of selling liquor, the license must issue, if at all, to the "real party in interest." In re Shue, (Nebr.) 133 N.W. 405 (1911); In re McDonald, (Nebr.) 127 N.W. 888 (1910). Thus, when a former saloonkeeper unable to obtain a license because of prior violations of the law, owns the business and fixtures in the place where the business is to be carried on, and an application for a license is made by his brother, an inexperienced boy without means of his own to pay for a license, a licensing board is without authority to grant the license, since it appears that the applicant is a mere dummy and not the real party in interest. In re McDonald, *supra*. In Barnard v. State, (Ala.) 48 So. 483 (1909) a retailer licensed to sell liquor, having been adjudged a bankrupt, purchased new stock and gave the seller a mortgage. By the agreement the mortgagee was to be the manager of the business, receive a salary, and "conduct the same for his own security" until the purchase price was paid. The consideration for the sale of the stock was adequate, and nothing in the record indicated that the arrangement was a mere device to avoid the necessity of taking out a license. It was held that the mortgagee, being an employee of the business, was within the protection of the mortgagor's license. On the other hand when the principal and owner of the business has no license, it is no defense that the employee may have a license which would permit him to conduct a business of his own. Commonwealth v. Zelt, 138 Pa. St. 615, 21 Atl. 7 (1891).

When there is a purported transfer of the business, the circumstances of the sale and the sufficiency of the consideration, are proper considerations in determining who is the principal in its future conduct. So, when the seller has no further interest in the business but executes a power of attorney appointing the buyer to act as his agent in conducting the business, the license issued to the seller will afford no protection to the buyer since the buyer is the actual principal, notwithstanding the "power of attorney." Young v. Stephenson, (Ark.) 86 S.W. 1000 (1905). If there has been a bona fide sale of a business, and the seller has no further connection with it, he is not liable for what may transpire thereafter on the premises. Lawler v. State, (Ind.) 99 N.E. 487 (1912). In this case it was held that when a license has been granted, proof of a sale of liquor made at the establishment by the person in charge is sufficient to make out a prima facie case of agency, but if a previous sale of the business is claimed, the prima facie case may be rebutted by evidence showing that the sale was supported by adequate consideration and that the transferee took over the business and conducted it as the sole proprietor.

In dealing with license statutes which require the licensing of the principal, or the "real party in interest" ultimately responsible for the conduct of the business, the problem is merely that of identifying the principal. The motives which led to his taking over the business, or the motives of the former owner in making the transfer, are immaterial, so long as the transferee is in fact the principal. When, however, the relation of an actor in the business to the business is in doubt, the intent with which certain acts are done may aid in determining whether the relationship is one of principal or agent. This was true in the Kimmins case, where no transfer of the business was involved, and is likely to be especially important in cases where there is, in the nominal sense, a complete transfer of the business, but circumstances indicate that the former owner has not completely parted with control and is something more than an agent of the buyer in the continued operation of the business.

(2)

If the business is transferred to a corporation in such manner that the licensee is enabled to continue his interest in, and control of, the business, and if such transfer is made for the purpose of evading the Act, he is still "engaged in the handling" within the meaning of the Act.

When the business is transferred to a corporation, the question arises whether the corporation will be recognized as the principal in the continued operation of the business, even under circumstances where the former owner retains such interest and control.

that, if the transfer had been made to a natural person, the original licensor would still be recognized as the principal. The problem here is whether the corporate entity will be penetrated so as to hold the individual dominating its affairs responsible for business conducted in the name of the corporation.

It is, of course, established that individuals cannot shield themselves from penal liability for their illegal acts merely by clothing such acts with corporate form. Redmond v. U. S., 8 F. (2d) 24 (C.C.A. 1st, 1925). This principle has been applied in the case of a statute making it an offense to engage in the business of dealing in deciduous fruits without a license. People v. Jarvis, (Cal.) 27 Pac. (2d) 77 (1933). In this case no license had been obtained and the conviction of the president and general manager, incorporators and principal stockholders, was upheld notwithstanding the fact that the contracts upon which the charge was based were entered into between the customers and the corporation. The court stated: (p. 82)

"Assuming that the contracts which were shown to have been made for the corporation by the fruit buyers were sufficient to show that the corporation acted as a dealer in deciduous fruits under the language of the Deciduous Fruit Dealers Act, we think that it is preposterous to urge that appellants may successfully interpose the corporate fiction as a shield to protect them from the consequences of their own acts. It is too clear from the evidence that the corporation was entirely guided and managed and controlled by appellants to permit so thin a defense. People v. Epstein, 118 Cal. App. 7, 4 P. (2d) 555."

The case of course does not stand for the proposition that, where one or two persons own all the stock and control the operations of a corporation, the corporation is not itself engaged in business. On the contrary the court assumes that the corporation acted as a dealer but refuses to permit the defendants to shield themselves behind the corporation to escape the penalty for their failure to obtain a license. Had the license been secured, it would no doubt have been in the name of the corporation. The Jarvis case in no way negatives the presumption that when a blanket license is issued to "those engaged" in a business, it extends to a corporation in whose name the business is conducted, irrespective of the number of stockholders or the character of its management. The presumption must be the same in respect to any new corporation, formed after the issuance of the license but falling within its terms, in the absence of circumstances indicating that the actual purpose or effect of the corporation is to permit an ineligible person to continue in business under the corporate name.

If the very purpose of creating the corporation is to circumvent the statute, in order to permit the owner to continue his interest in, and control of, the business, notwithstanding his former violations, there is no doubt, in my opinion that he may still be regarded as "engaged in" the business. That the corporate device may not be availed of to evade a statute has been affirmed with many varying applications.

Thus when a transfer of assets is made to a corporation created in another state for the purpose of invoking federal jurisdiction, and the former owner retains the power by virtue of his stock ownership to compel a re-conveyance, the federal courts will treat the device as a fraud upon the law and dismiss the case for lack of jurisdiction. Lehigh Mining & Mfg. Co. v. Kelly, 160 U.S. 327 (1895); Miller & Lux, Inc. v. East Side Canal Co., 211 U.S. 293 (1908). Nor may resort be had to the creation of a corporation as a means of avoiding the antitrust laws. Northern Securities Co. v. U.S., 193 U.S. 197 (1904); Ford v. Chicago Milk Association, 155 Ill. 166, 39 N.E. 651 (1895).

In U.S. v. Del. Lackawanna & Western R.R., 238 U.S. 516 (1915) there was involved the commodity clause of the Hepburn Act prohibiting railroads from transporting coal in which the railroads have an interest. The railroad, owning large coal mines, organized a new corporation with practically the same stockholders and officers and entered into a contract with the new corporation by which it was to buy from the railroad all coal at the mines, should transport it over its lines, and should not buy from others without the consent of the railroad. The court recognized that there may be diversity of corporate interest, even where there is an identity of corporation members, but found that the contract was opposed to the policy of the law, in that the railroad retained an interest in the coal and the new corporation was not free to act as an independent buyer. The railroad was accordingly enjoined from transporting coal sold under the contract. The fact that the railroad was under a statutory disability as to hauling coal was an element considered in determining the validity and good faith of the contract.

In U.S. v. Milwaukee Refrigerator Transit Co., 142 Fed. 247 (1905) the court overruled demurrers in a suit to enjoin certain payments which the Government contended were rebates prohibited by the Elkins Act. Those in control of the defendant brewing company had organized the Transit Company and had contracted to give it control of all the brewing company's shipments. The Transit Company claimed that the payments it received from the carriers were for services rendered the carriers in obtaining business. The legality of the payments depended upon the intent with which they were made, and the court found the bill sufficient in offering to show that the transit company was a mere dummy created with intent to evade the law, without proving actual repayment to the brewing company.

The court made this statement of the general rule: (p. 255)

"If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until a sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

The case of State v. Stafford, 159 N.E. 829 (1927) is specific authority, to the effect that the device of incorporation may not be used to overcome a license disqualification. An Ohio statute provided that no person might be licensed as an insurance agent unless a resident of the state but provided for a foreign broker's license for non-residents to do business in other states in insuring Ohio property. A foreign insurance company, having such a license, in order to do business in Ohio, organized an Ohio corporation in which it owned a majority of the stock. In an action to compel the issuance of a license to the new corporation, it was held that a non-resident insurance company, disqualified from securing a license to do business in the state, can not, in the guise of the owner of a controlling interest in a domestic corporation, overcome the disqualification. The court rested its decision on the familiar ground that the corporate device may not be used to circumvent a statute.

That the creation of a corporation and the transfer to it of a business, for the purpose of permitting an ex-licensee to continue in business in spite of the revocation of his license, is an attempt to circumvent the Agricultural Adjustment Act we think is plain. Suspensions and revocations of license are permitted, under Section 8 (3), only after notice and opportunity for hearing, for violations of the terms and conditions of the license. They constitute enforcement devices, and under the Act as originally enacted, they constituted the only means of enforcement specifically provided. For continuing in the business, after revocation, the Act provides a severe penalty. As concluded previously in this memorandum, the owner cannot escape liability by putting the business in the name of another person unless he parts with ownership and control. If, through setting up a corporation in which the former owner retains both, he can escape the responsibility of a principal in the business, he will be able, under corporate form, to do exactly what the Act prohibits. The revocation proceedings will accordingly be rendered ineffective and the enforcement of the Act will be jeopardized. An attempt to accomplish such results can be viewed only as an attempt to circumvent the Act.

But it may be asked whether it is necessary that there be an actual intent to evade the statute, and whether it is not enough that the effect of setting up the new corporation is to enable the former owner to continue in the business in every substantial sense. A situation may be considered in which a licensee, who has violated his license, incorporates his business. If the element of intent is not a factor, it could not matter that the incorporation might have been made for ordinary business reasons in no way connected with the violations, or that no revocation proceedings had been instituted against the former proprietor; he would still be directly responsible for past, as well as future violations.

It is true that, on what may be called the alter ego theory, the acts and obligations of a corporation can sometimes be legally recognized as those of a particular person, even though no fraud be alleged. The doctrine of the California court in this respect as set forth in Minifie v. Rowley, (Cal.) 202 Pac. 673, 676 (1922) and Wittman v. Wittingham, (Cal.) 259 Pac. 63, 66 (1927) is as follows:

"Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or the separateness, of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice."

Thus the assets of one corporation may be held subject to the claims of creditors of another when the corporation is a mere dummy and "business conduit" of the other. In re Muncie Pulp Corporation, 139 Fed. 546 (C.C.A. 2nd, 1905). Nevertheless, on very similar facts, a court may insist upon the presence of fraud and, in its absence, adhere to a strict observance of the distinct corporate entities. In re Watertown Paper Co., 169 Fed. 252 (C.C.A. 2d 1909). So when there is nothing harmful and unlawful in a scheme by which a holding company buys up the stock of various subsidiary companies, the mere fact that by ownership of stock it may control the operations of the subsidiary does not make it liable on a lease entered into by the subsidiary. Majestic Co. v. Orpheum Circuit, 21 F. (2) 720 (C.C.A. 8th 1927). But where a lease of a mining company's property to a corporation which acquires its stock and assumes exclusive control of the property is resorted to as a device to avoid a burdensome feature of a basing contract of the mining company while enforcing the contract against the other party, the

lease will not be upheld. Wilson & Toomer Fertilizer Co. v. American Cyanamid Co., 33 F. (2d) 812 (1929).

This distinction of result depending on the element of intent is also illustrated in the case of contracts for the sale of a business accompanied by a covenant not to engage in the same line of business. In Beal v. Chase, 31 Mich. 490 (1875), an individual who had sold out a profitable business in which he had built up a reputation and had agreed not to compete, formed a corporation with others who knew of his contract, for the purpose of continuing in the same line. That the association thus formed for the purpose of violating the contract assumed corporate form was regarded as immaterial by the court, which allowed a decree enjoining the individual defendant and enjoining also the corporation from carrying through the proposed dealing with him, directly or indirectly. Cf. American Preservers Company v. Morris, 43 Fed. 711 (1890), where the court refused to enjoin the corporation, which had not been formed to evade the contract, and Moore & Handley Hardware Co. v. The Towers Hardware Co., (Ala.) 6 So. 41 (1889), where no injunction was allowed in the absence of an allegation of fraud.

When an individual transfers assets to a corporation which stands to him in the relation of an alter ego, he may still be held accountable as the owner of the property, although no fraud be shown, where the transfer is for any reason incomplete. Thus, in Corker v. Soper, 53 F. (2d) 190 (1931), a banker who had created a corporation to hold bank stock owned by himself and members of his family for the avowed purpose of avoiding liability for assessment on the stock, was nevertheless held liable to assessment on the shares he had put in the corporate name. The court explicitly recognized the reality of the corporation and stated that it acted only to deny effect to the particular intent which induced the defendant to create it, not because the transfer was fraudulent but on the ground that it was not complete, since the beneficial ownership remained in the defendant.

A similar result is reached in Hamilton Ridge Lumber Sales Corp. v. Wilson, 25 F. (2d) 592 (1928), where a dummy corporation was created by an insolvent corporation and its creditors, and a purported sale of part of the stock of the debtor was made for the sole purpose of securing the creditor. The court remarked that the doctrine of looking through the corporate entity is "applicable wherever reason and justice require its application though the acts of the parties amount to constructive fraud only." The actual ground of the decision, however, would seem to be that there had been no sale.

The cases do not lend support to the view that, when a new corporation is established and a complete transfer of the business is made, the transferor is still to be regarded as the principal, on the ground merely that to hold otherwise would have the effect

of circumventing a statute, although no intent to circumvent the statute is shown. In State v. Safford, *supra*, the domestic insurance company, as the court emphasized, was organized for the very purpose of overcoming the disqualification of the foreign company. That an intent to evade the statute is an essential element, see Lehigh Mining & Mfg. Co. v. Kelly, 160 U.S. 327, 339 (1895); Miller & Lux v. East Side Canal Co., 211 U.S. 293, 304 (1908); U.S. v. Milwaukee Refrigerator Transit Co., 142 Fed. 247, 255 (1905).

The effect of intent, with respect to licenses under the Agricultural Adjustment Act, may be considered with reference to the following situations:

- (1) Where the licensee, after a violation but before notice of revocation proceedings, has for legitimate business reasons and without intent to evade the statute completed a transfer of the assets to a corporation, which he dominates and controls,
- (2) Where the licensee, after notice of revocation proceedings and with intent to avoid the consequences, transfers the assets to a corporation which he dominates and controls.
- (3) When the licensee, after such notice, but for legitimate business reasons and without intending to circumvent the statute, transfers the assets to a corporation which he dominates and controls.

With respect to the first situation, it must be noted that, under the Act, it is not a violation of the license per se but a revocation of license which disqualifies one from continuing in the business. At the time of the creation of the corporation, therefore, the owner was under no disability as to continuing his business, in corporate or other form. The fact that the owner may continue his interest and control as the sole stockholder does not negative the existence of a distinct corporate entity nor in itself warrant disregard of the corporate form. See Fletcher's Cyclopaedia of Corporate Law (Perm. Ed.) Section 41; Wormser, the Veil of Corporate Entity, 12 Col. L. R. 496, 503 (1912). The corporation, thus lawfully created for a lawful purpose and carrying on the business with proper observance of corporate forms, is properly to be regarded as "engaged in the handling" and thus within the provisions of the blanket license. If this be so, then the corporation is the licensee, and not the former owner. The latter, as a stockholder, is not "engaged in the handling," and insofar as he manages the business of the corporation he is a mere agent, within the protection of the corporation's license. It is difficult to see how revocation proceedings based on conduct prior to the setting up of the

corporation can have the effect of reaching through the corporate form, validly created, to obliterate these relationships and justify the treatment of the stockholder as still "engaged in the handling" in the capacity of independent contractor.

The situation does not fall within the reasons for the disregard of corporate entity set forth in the cases examined above. As has been seen, if the transfer is complete, and there is no element of fraud, in order to attribute the acts of an individual to a corporation, or vice versa, it is at least required that some unjust result be apprehended from looking solely to the corporation. In the situation under consideration it is true that the fact of incorporation may have placed the former owner in a more favorable situation than he would have occupied since it permits him for all substantial purposes to continue in the business-- a privilege which he might otherwise have forfeited. But such result was not intended. There has been no flouting of the law, no attempt to defeat enforcement, and no rights of third parties have been injured.

The situation is very difficult from that existing where the corporation has been set up after notice of revocation proceedings and for the very purpose of enabling the proprietor to evade the penalties of the Act. In such case the corporation is a mere device under the guise of which the transferor has continued to engage in the business. The policy of the statute requires that in such case he shall not be protected by the corporate form.

The third situation is more difficult. Even if fraud be recognized as an essential element, however, the corporate form should offer no protection to the transferor in such case because constructive fraud is apparent. The good faith of a person in setting up a corporation is not always to be measured by the quality of his intentions but by the legal effect of what he deliberately does. See First National Bank v. F. C. Trebein Co. 59 Ohio S. T. 316, 52 N. E. 834, 837 (1898). When the owner of a business, after notice of proceedings for revocation of license, proceeds with the setting up of a corporation through which he intends to continue the operation of the business, though in corporate form, he does so with the knowledge that if the corporation is recognized as a distinct entity for all purposes, the revocation proceedings will be rendered ineffective. Until his license is revoked, or some restraining order is issued, he may lawfully proceed with his scheme to incorporate the business but he cannot be permitted thereby to escape the consequences of his past unlawful conduct and defeat the legal processes already instituted against him.

III. Proceedings Against Transferees

(1)

The license of a transferee may not be revoked for violations,

occurring prior to the transfer,
of the similar license issued to
the transferor.

When the transfer is complete, and the former owner parts with all interest and control, no basis exists for holding the transferee accountable for the previous conduct of the transferor. In such case it is immaterial whether the transfer be made to a corporation or to a natural person. It is not objectionable, moreover, that the original proprietor and licensee should be active in the creation of the corporation to which the assets are transferred, since the creation of a corporation may be the most feasible means of divesting himself of the ownership and control of a business for which an immediate market is not available. See U. S. v. Del. Lackawanna & Western R.R., 238 U.S. 516, 527 (1915).

If the transfer is made to a natural person, and is not complete, then, as we have before concluded, the transferor may be regarded as continuing in the business. His license, being personal to himself and unaffected by the purported transfer, is therefore still subject to revocation for violations occurring either before or after the transfer; or, if it has already been revoked, he exposes himself to the penalty provided in the Act for engaging in the business without the required license. If, conversely, the transferee is but an agent of the transferor and is not independently engaged in the handling, then he is not within the terms of the license and is accordingly not a licensee. If not a licensee, he cannot be subject to a revocation of license, and, if not "engaged in handling" he cannot be subject to the penalties provided for so engaging without a license.

A transfer of a business to a corporation may be technically complete and yet not serve to divest the original proprietor of his actual ownership and control. If, however, the corporation was not created in order to evade the statute and if all the formalities of corporate organization and procedure are observed, the courts may be expected to give effect to the corporate personality to the extent of treating it as actually engaged in the business and as falling within the definition of a licensee. If this be the case, then the license cannot be deemed to have issued to the corporation until it came into existence and began to function. It follows that any violation by the transferor prior to the transfer cannot be chargeable to the corporation as a violation of the corporation's license; hence the corporation's license may not be revoked for the prior violations of the transferor. In stating this conclusion, however, it is not overlooked that there may be provisions in licenses which make it a violation for a licensee to have dealings with persons who have been guilty of direct violations, and the violation of such provisions may in itself furnish a ground for revocation.

(2)

Transferees who may not be subject to revocation of license may nevertheless, if acting as the agents of, or in collusion with, the transferors be subject to restraint or penalty through other forms of proceedings.

Although a transferee may not be subject to revocation of license for violations occurring prior to the transfer, it does not follow that he may continue to deal with the transferor in ways which tend to circumvent the statute. It is not proposed to deal in detail with these possibilities, which lie outside the field of administrative proceedings, but there may be mentioned:

- (a) Restraint through injunction
- (b) Prosecution for conspiring to commit an offense against the United States.

(a) Injunctions

Unlike revocation orders, which are addressed only to licensees, when injunctive relief has been obtained against a threatened violation of a license, or, after revocation, against continuing in the business, the decree has been drawn to include not only the principal actually conducting the business but also his agents. See final decrees in U. S. v. Calistan Packers, 4 F. Supp. 660 (D.C. Cal. 1933); U. S. v. Shissler, N.D. Ill., No. El3803, April 14, 1934. Accordingly, when the proprietor of the business makes a colorable transfer and continues to conduct the business through the transferee as an agent, the transferee may be guilty of violating an injunction which in terms restrains the owner and his agents and employees as well. To render persons so acting amenable to an injunction it is not necessary that he should have been a party to the suit, nor served with a copy of the decree so long as he had actual notice. See In re Lennon, 166 U.S. 548, 554 (1897).

Where the decree is directed against the defendant and his agents, an agent is bound in respect to his actions only so long as he continues in that relationship. The state of the authorities on this point is thus stated in Hoover Co. v. Exchange Vacuum Cleaner Co., Inc., 1 F. Supp. 997, 998 (1932):

"The law is settled that, where a corporation, along with 'its officers and agents', has been enjoined from doing a certain act, an officer or agent who has severed altogether his connection with the corporation does not violate the injunction by doing the act himself

or by assisting an outsider to do it. This is for the reason that there is no restraint upon the officer or agent personally, but only as a representative of the enjoined defendant. Harvey v. Bettis (C.C.A.) 35 F. (2) (349; Alemite Mfg. Corp. v. Staff (C.C.A.) 42 F. (2d) 832; Dadirrian v. Gullian (C.C.) 79 F. 784; Donaldson v. Roksament Stone Co. (C.C.) 178 F. 103; Bliss Co. v. Atlantic Handle Co. (D.C.) 212 F. 190. Cases to the contrary, such as Campbell v. Magnet Light Co. (C.C.) 175 F. 117, and Donaldson v. Roksament Stone Co. (C.C.) 176 F. 368, have been disapproved. The situation is quite different where the sequence of events has been reversed--where an individual has been enjoined and thereafter becomes connected with a corporation that with his assistance commits acts in violation of the injunction. In such cases the individual is personally bound by the injunction, has flaunted it by his own acts, and may be attached for contempt, Smith Metal Window Hardware Co. v. Yates (C.C.A.) 244 F. 793." (at p. 998)

The rule appears to be the same where the decree names other persons, not parties of record, and names them because of some particular relationship to the defendant: the decree binds such persons only for acts done in that relationship. This is illustrated in the use of proceedings against a dealer to restrain him from selling an article infringing a patent, when the defense of the suit was undertaken by the manufacturers on behalf of the dealers. The decree granting the injunction was made to read: "You, the said A. G. Spalding & Bros., and your officers, trustees . . . and manufacturers." It was held in subsequent litigation that the manufacturers were not guilty of contempt for violation of the injunction for selling the article to others than Spalding & Bros. United States Playing Card Co. v. Spalding, 92 Fed. 368 (1899). The court said: (p. 368)

"If they had done it in aid in any way of a violation by Spalding Bros., upon the supposition of which this proceeding may have been commenced, the question would be very different. Cases are cited in which language is used that by itself might indicate that any one, anywhere, having knowledge of an injunction, might not do what would violate it if done by those included within it; but, as understood, none of them go outside the scope of the injunction itself. That of In re

Lennon, 166 U.S. 548, 17 Sup Ct. 658 (at page 554, 166 U.S., and page 660, 17 Sup. Ct.), is as broad as any; but it must be read, as it was used, with reference to the case, which was against a locomotive engineer, the servant of a corporation enjoined about hauling cars, who was not named in the suit or the injunction, nor served upon, but had notice."

If the transferee did not occupy the relation of agent to the original license, until after the issuance of the decree, he may nevertheless be guilty of a violation of the injunction because conspiring to defeat it. Thus, when certain persons and their agents and employees were restrained by the terms of an injunction in a labor dispute case, and the officers enjoined thereafter employed an agent to assist in the conduct of the strike, the agent was punished for contempt

"not on the ground that (he) . . . and the other conspirators who are named, but are not parties to the original bill, are directly restrained, but because they have made themselves amenable to the process for contempt by combining and confederating with those who were enjoined, and by aiding and assisting them in the violation of the injunction of the court." W. B. Conkey Co. v. Russell, 111 Fed. 417, 422 (1901).

When the transfer is to a corporation which is but the alter ego of the original owner and which is created for the purpose of enabling him to continue in the business notwithstanding the injunction the corporation may be guilty of contempt, not as an agent, but because it has acted collusively with the defendant to violate the decree. To the reasons already set forth as sufficient to justify penetrating the corporate veil, there is added in such case the necessity of upholding the effectiveness of the court's decree. The force of this additional element is indicated in Farmers' Fertilizer Co. v. Rich, 7 Ohio Ap. 430 (1917). A fertilizer company had been enjoined from permitting the escape from its premises of offensive odors, but the order did not include its agents, successors, or assigns. Thereafter a new corporation was formed, with practically the same controlling officers and stockholders to which the assets of the old corporation were transferred. The new corporation was held guilty of violating the injunction although not named therein. The court said:

"In the case at bar the new corporation succeeded the old in the ownership of

the property and plant and in the conduct of the business. The new corporation was controlled by officers and agents and stockholders who were bound by the injunction, and who were acting under a charter. It is a case, therefore, where the fiction of reincorporation should as to the injunction, be disregarded. Besides, even if the new corporation were a new entity, the circumstances of the transfer of title and the knowledge of the officers and agents of the new company would hold them liable to the injunction of which they had notice, and which affected the management of the business to which they had succeeded."

The reasoning in this case is not satisfying. In the first place, the new corporation had entered upon additional lines of business, and there was not such identity of ownership as would warrant disregarding the corporate entity. That the corporate entity was in fact recognized is demonstrated by the fact that the corporation itself was held guilty of the violation, and the true ground of the decision would seem to be that the new corporation acted in collusion with those bound by the injunction to violate its terms. This would rest the decision on the doctrine expounded in W. B. Conkey Co. v. Russell, supra.

If the new corporation is organized for the purpose of avoiding the injunction, there is no difficulty in holding it in contempt for acts done, at the direction of officers who were named in the decree. In Bernard v. Frank, 179 Fed. 516 (C.C.A. 2nd-1910) an individual who had been enjoined from making certain articles transferred his business to a corporation, and the corporation was held guilty of contempt. The court stated: (p. 517)

"It is true that the corporation is not expressly named as defendant, but it could not have had more direct and explicit notice of the injunction if it had been so named. It was cited by an order of the Circuit Court to appear and show cause why it should not be punished for contempt in violating the injunction and was given full opportunity to purge itself. In organizing the corporation Bernard was the moving spirit. That it was organized for the purposes of escaping the consequences of the infringement of the patent which Bernard had sold and assigned to the complainants, is too plain for controversy. That Bernard, as its treasurer, fully

represented the corporation cannot be doubted and if the formality of a separate action had been deemed necessary, service on Bernard, the individual, would have been binding on Bernard, the corporation. A person who, with full knowledge of its provisions, has violated an injunction may be punished for contempt, although not a party to the suit."

It will be observed that in the above cases there was not such apparent identity of ownership and control as would constitute the new corporation the alter ego of the former proprietor. It was enough that the prohibited act was performed by the new corporation acting in collusion with the former proprietor for that purpose.

In the case of an injunction issued against a licensee under the Agricultural Adjustment Act, the prohibited act will be, presumably, either the violation of the licensee's license or, if the license has been revoked, the continuation of the business by the ex-licensee. The continuation of the business itself, under new ownership, is not prohibited. Thus if there has been a complete and bona fide transfer to a new corporation, no act of such new and independent corporation can be a violation of the license of the transferor, nor can it constitute the prohibited continuance in business by the transferor whose license has been revoked. In order to find a transferee corporation guilty of contempt, therefore, it would seem to be necessary that such corporation should be in effect merely the alter ego or the agent of the former proprietor.

(b) Conspiracy.

When a license has been revoked and the licensee makes a transfer of his business to another person or to a corporation acting as a mere dummy or device for enabling him to continue in the business, there can be no question that the transferee in lending itself to such an arrangement is guilty of a conspiracy against the United States.

Conspiracy as a criminal offense is thus defined in the federal statutes, 18 U.S.C.A., Sec. 88 (Criminal Code, sec. 37):

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each

of the parties to such conspiracy shall be fined not more than \$10,000 or imprisoned not more than two years, or both."

That a conspiracy to enable the ex-licensee to continue in business is a conspiracy to commit an offense against the United States is plain. Section 8 (3) of the Agricultural Adjustment Act provides that any person engaged in handling a commodity in interstate commerce

"without a license as required by the Secretary under this section shall be subject to a fine of not more than \$1000 for each day during which the violation continues."

It does not specifically state that such conduct shall constitute a crime or an offense. It is not necessary to consider whether the fact that a penalty is attached is sufficient to make such conduct a crime, for the reason that to constitute an act an offense against the United States within the meaning of the conspiracy statute, it is not necessary that it be punishable as a criminal offense. This was determined in U.S. v. Hutto, 256 U.S. 524 (1921), in which it was charged that the defendants conspired that an employee in the Indian Service should have an interest in certain dealings with the Indians in violation of the provisions of Section 2078 Rev. Stat. In discussing what constitutes an "offense" under the conspiracy statute the court said: (pp. 528-9)

"Nor can we sustain the other ground upon which it is contended the demurrers were well taken. Section 37, Criminal Code, is violated by a conspiracy 'to commit any offense against the United States' accompanied or followed by an overt act done to effect the object of the conspiracy. It does not in terms require that the contemplated offense shall of itself be a criminal offense; nor does the nature of the subject-matter require this construction. A combination of two or more persons by concerted action to accomplish a purpose either criminal or otherwise unlawful comes within the accepted definition of conspiracy. Pettibone v. United States, 148 U.S. 197, 203. The distinction between a conspiracy and the contemplated offense that forms its object has often been pointed out. United States v. Rabinowich, 238 U.S. 78, 85-86, and cases cited. And we deem it clear

that a conspiracy to commit any offense which by act of Congress is prohibited in the interest of the public policy of the United States, although not of itself made punishable by criminal prosecution but only by suit for penalty, is a conspiracy to commit an 'offense against the United States' within the meaning of § 37, Criminal Code, and provided there be the necessary overt act or acts, is punishable under the terms of that section."

"We have assumed, for the sake of the argument, that under § 2078, Rev. Stats., the United States is confined to the suit for penalty specifically mentioned; but we do not so decide, and in our view the present case does not require an expression of opinion upon that subject." See United States v. Stevenson, 215 U.S. 190, 197, et seq.

Upon similar reasoning a conspiracy to pay a certain sum to a person to assume the name and character of a convicted offender and to serve out the offender's sentence, constituting a contemptuous disobedience or resistance to the lawful process of a federal court in a criminal cause, has been held to constitute a conspiracy to commit an offense against the United States. Biskind v. U.S., 281 Fed. 47 (C.C.A. 6th, 1922). The question of a contempt in a civil case, which was not involved in the Biskind case, was passed upon in Taylor v. United States, 2 F. (2) 444 (C.C.A. 7th, 1924), where it was held that it is an offense against the United States to violate an injunction issued by a court of the United States.

It therefore appears that, although the mere violation of a license issued under the Agricultural Adjustment Act is not made an offense or the subject of a money penalty by the Act, a conspiracy to violate a license, after an injunction has issued against the licensee, is a conspiracy to commit an offense against the United States, and therefore indictable. If a transferee is a party to such a conspiracy, as it may be if the transferor has not actually parted with ownership and control, the transferee may be prosecuted for the crime of conspiracy under section 37 of the Criminal Code.

Telford Taylor,
Acting Chief of Brief and Opinion Section,
Office of the General Counsel.

No. 117

BREACH BY OTHER SIGNATORIES AS DEFENSE
TO AN ACTION UPON MARKETING AGREEMENT

The refusal of parties signatory to the Evaporated Milk Marketing Agreement to comply with the Agreement or the failure of the Government to enforce the Agreement against such non-complying signatories is no defense in an action against another signatory to enforce the Agreement.

This conclusion is subject to the qualification that, if so many other parties signatory are violating the terms of the Agreement as to constitute a substantial failure of consideration, the defense is valid.

August 15, 1934.

MEMORANDUM TO MR. BACHRACH

Pursuant to your request dated April 26, 1934, I render my opinion upon the following:

QUESTION

Is the refusal of parties signatory to the Evaporated Milk Marketing Agreement to comply with the Agreement, or the failure of the Government to enforce the Agreement against such non-complying signatories, a valid defense in an action against another signatory to enforce the agreement?

OPINION

The defense is not a valid one.

DISCUSSION

I.

In an Ordinary Contract, the Failure of Other Parties To Comply With their Obligations in their Similar Contracts Is No Defense Unless Such Compliance on The Part of Such Other Parties Is a Condition of Defendant's Performance.

It is obvious that a contractor is bound only by the terms of his own contract. The terms of anyone else's contract are of no concern to him unless in some way they are made a part of his own contract.

Cases closely in point are those involving subscriptions. In such a situation, a subscriber may, of course, condition the performance of his own agreement to subscribe upon actual performance of their agreements by the other subscribers. Performance on the part of the subscriber-contractor is thus expressly conditioned upon performance of their contracts by other parties. For instance, in Rogers v. Galloway College, 64 Ark. 627, 44 S.W. 454 (1898), a subscriber promised money on the condition that four other persons would also contribute specified sums. In a suit to enforce his subscription, his defense was that the condition of the other persons' subscribing had not been fulfilled and, therefore, that he was not required to perform. The court, however, after inquiry, found that the others had performed and, therefore, the condition to defendant's performance had been fulfilled. But it was implicit that, had the defense been established, it would have been a good one.

The rule when performance is not thus conditioned upon performance by other subscribers is indicated in Wilson v. First Presbyterian Church, 56 Ga. 554 (1876), where suit was instituted on a subscription, and the defense was that the subscriber was discharged because the plaintiff "gave time to another subscriber and let him off without exacting interest". (p. 556). But the court held:

"The contract was not so joint and the several promises so dependent upon each other as to relieve all the rest by indulging one, or letting one off without making him pay interest." (p. 556)

And in Brown v. Marion Commercial Club, 50 Ind. App. 670, 97 N.E. 958 (1912) the court stated, in discussing the nature of defendant's promise to subscribe:

"We agree***that the subscription relied on is several * * * his (defendant's) default would not affect the liability of any other subscriber; nor would the failure of any other subscriber to pay increase or diminish appellant's liability." (p. 960)

In our case, performance of the terms of the Marketing Agreement by any party signatory is in no way made conditional upon other parties' performance. On the other hand, each party is by the specific terms of the Agreement in question severally and independently bound. The first paragraph of the Agreement reads:

"This Agreement, entered into by and between the Secretary of Agriculture of the United States of America, and each of the manufacturers of evaporated milk signing this Agreement, and by and between each of the manufacturers one with the other, witnesseth that * * *." (Underscoring supplied)

Furthermore, according to Section 24 of the Marketing Agreement it is provided that if the Agreement is for any reason declared invalid as to any person, the obligations of any other person shall nevertheless not be affected thereby.

Nor could there be any such condition of performance implied in the agreement. When conditions are not expressed in an agreement, they will be implied only when to do so will effectuate the obvious, though unexpressed, intent of the parties.

"Wherever, therefore, a contract cannot be carried out in the way in which it was obviously expected that it should be ~~carried~~ out without one party or the other performing some act not expressly promised by him, a promise to do that act must be implied." Williston, Contracts, Sec. 1293.

As the court stated in E. I. Du Pont Co. v. Schlottman, 218 Fed. 353 (C.C.A. 2nd, 1914), in discussing the tests to be applied in the implying of terms in contracts, quoting from the case of Booth v. Cleveland Mills Co., 74 N.Y. 15, 21:

"There is no particular formula of words, or technical phraseology, necessary to the creation of an express obligation to do, or forbear to do a particular thing or perform a specified act. If, from the text of an agreement, and the language of the parties, either in the body of the instrument, or in the recital or references, there is manifested a clear intention that the parties shall do certain acts, courts will infer a covenant in the case of a sealed instrument, or a promise if the instrument is unsealed, for nonperformance of which an action of covenant or assumpsit will lie. It is a cardinal principle that every agreement or covenant must be interpreted according to its peculiar terms, and so as to carry out the intent of the parties. * * *." (p. 355) (Underscoring supplied)

Therefore, a condition will only be implied when "there is manifested a clear intention that" it was meant to be a part of the contract, even though unexpressed. But as the intent of the contract in question is so clear that defendant's performance was not meant to be conditional upon the performance of all the other parties to the Marketing Agreement, no condition to the contrary will be implied.

II.

There is No Obligation, Express or Implied, Imposed Upon the Secretary by the Agreement to Enforce, the Marketing Agreement.

There is no express provision in the Agreement whereby defendant's obligations are conditioned upon any use of his enforcement powers by the Secretary. On the other hand, the contract expressly otherwise provides. Section 11 of the Agreement provides that if any manufacturer learns of the violation of the Agreement on the part of any other manufacturer, he shall notify a committee set up by the Agreement. Certain duties are then imposed upon the committee. The Agreement then goes on to provide that if after due notification to the alleged guilty party by the committee:

"If the party continues in the violation, the committee shall notify the Secretary, who may take such action as he deems necessary including cancellation of this contract with respect to said party." (Underscoring supplied)

Thus, whether any steps whatsoever shall be taken against the non-complying member is left entirely to the discretion of the Secretary, who "may" take such action as he deems fit. Nor can it be contended that the permissive word "may" herein employed was meant to impose a mandatory

obligation upon the Secretary. For in other parts of the same Agreement the imposition of obligations, both upon the Secretary and upon other parties, is expressed by the use of the mandatory word "shall", as distinguished from the use of the permissive word "may". For instance, in the very same section, itself, it is stated that parties who learn of violations by other parties "shall" notify the committee. Many other duties are also imposed in this same section by the repeated use of the word "shall". Also, in Section 17 it is stated that "the manufacturers shall severally maintain systems of accounting * * *." Likewise, in the same paragraph it is stated that "all information obtained by or furnished to the Secretary pursuant to this paragraph shall remain the confidential information of the Secretary, and shall not be disclosed by him * * *." But farther on in the same paragraph it is provided that "the Secretary, however, may combine and publish the information obtained from the manufacturers in the form of general statistical study or data."

It is well settled, of course, that ordinarily the term "may" connotes permissiveness and is not of mandatory meaning, such as is the word "shall". Farmers Bank v. Federal Reserve Bank, 262 U.S. 649 (1923). Only when the construction of a statute is involved, is it possible to give the word "may" such an unusual interpretation as "shall". In a private contract it will not, however, receive such a construction.

"May' does not mean 'shall' and is not^{so} construed in private contracts. It is only in the case of statutes by which public rights are involved that this construction is sometimes adopted ex debite justitia." N.W. Traveling Men's Association v. Crawford, 126 Ill. App. 468 (1906).

The necessity of giving the word "may" its ordinary and usual permissive meaning is equally as imperative when it is a Government contract that is involved. National Contracting Co. v. Commonwealth, 183 Mass. 89, 66 N.E. 650 (1903). Especially is it clear that the word "may" will be construed as permissive when words of mandatory import, such as "shall" are employed in the very same provision. Cf. Farmers Bank v. Federal Reserve Bank, supra. And, as we have seen, the word "may" is used in the very same section in conjunction with the use therein several times of the word "shall".

It is also significant that where the Agreement imposes specific obligations upon the Secretary, it does so in unqualified language. For instance, in paragraph 17 it is provided that "the Secretary hereby agrees to issue regulations and prescribe penalties to be imposed in the event of any violation of the confidence or trust * * *."

Here also is there no problem of implying such a promise on the part of the Secretary to enforce the Marketing Agreement against non-complying signatories. As we have seen, promises are only implied in contracts when to do so would effectuate the obvious intent of the parties to the agreement. Where the terms of the agreement are so clearly expressed as to leave no doubt concerning the intent of the

contractors, no condition will be implied so as to effectuate a contrary intent. As it is stated in Williston, Contracts, Sec. 1293, quoting from the English case of Brodie v. Cardiff Corp. (1919), A.C. 337, 358:

"The introduction of an implied term into the contract of the parties * * * can only be justified when the implied term is not inconsistent with some express term of the contract and where there arises from the language of the contract itself, and the circumstances under which it was entered into, an inference that it is absolutely necessary to introduce the term to effectuate the intention of the parties."

It should be further noted that, rather than a duty being imposed upon the Secretary to enforce, the only obligations with reference to enforcement appearing in the contract are those imposed upon the parties to the Agreement themselves. Section 11 of the Agreement provides:

"If it shall come to the knowledge of any manufacturer that any other manufacturer is violating any of the terms or conditions of this agreement, the party having such knowledge shall notify the manufacturers' committee * * *."
(Underscoring supplied)

It is in the same paragraph in which it is stated that after action taken by the committee, the Secretary "may" take such action as he deems necessary."

III.

No Different Conclusion Can Be Arrived at Due to the Fact that This Is a Contract to Which the Government is a Party. Government Contracts Are to be Interpreted in the Same Way as Other Contracts.

It is clear that the United States as a contractor is subject to the same rules that govern private parties, and that a contract to which the Government is a party is not to be construed any differently because the contractor happens to be the Government. Maxwell v. United States, 3 Fed. (2nd) 906 (C.C.A. 4th, 1925). In the Maxwell case the United States sued a party with whom it had contracted, and his surety, for the excess over the contract price that it cost the United States to take over and complete the contract. The defendant had agreed to construct a building for the Government. But although time was of the essence of the contract, defendant failed to complete it at the stipulated time. Defendant claimed, however, that he was relieved from liability for failure to complete the contract on time by the war activities of the Government which made it impossible for him to procure the necessary labor and materials. But the court held that contracts to which the Government is a party are to be construed in the same way as those to which private persons are parties. It therefore held that defendant's defense, which would not be a valid

defense if its contract had been with a private party, would not be any more effective because the undertaking was with the Government.

In like manner, as was stated by Mr. Justice Miller in Smoot's Case, 82 U.S. 36 (1872), in which it was a Government contract that the court was construing:

"In approaching the inquiry into the effect which the action of the bureau of cavalry, in adopting these new rules for inspection, had upon the rights of the parties to this contract, let us endeavor to free ourselves from the consideration that the Government was one party to the contract * * *; for we hold it to be clear that the principles which must govern the inquiry are the same as if the contract were between individuals * * *." (p. 47).

Or as Justice Butler stated in Reading Co. v. United States, 268 U.S. 186 (1925), in which case plaintiff sued to recover on a contract with the United States:

"The contract is to be construed and the rights of the parties are to be determined by the application of the same principles as if the contract were between individuals." (p. 188)

The same principles apply with reference to implying conditions in contracts to which the United States is a party. In Cory Brothers v. United States, 51 Fed. (2nd) 1010 (C.C.A. 2nd, 1931), suit was instituted against the United States for charges implied on a contract. And it was held by the court, quoting from United States v. Bostwick, 94 U.S. 53, 66:

"***The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them."

It, therefore, seems clear that merely because the Government is one party to this Marketing Agreement is no reason to impose upon it different obligations than would be imposed if it had been a private party instead of the Government that was the contractor, as neither a condition of other parties' performing the contract, nor of one party's taking steps to enforce the Agreement would be implied if it were only private persons who were parties to this agreement.

Even if the parties to these agreements supposed that because the Government has peculiar powers of enforcing the Agreement, - because it is the Government - it would do so, or if the parties believed that where the Government enters into a contract, the success of which largely depends upon its power to enforce, that there is, therefore, an implied promise on the part of the Government to so enforce, the

result will be no different. Contracts are not construed in accordance with suppositions. As the court stated in McCarrigle v. Green, 76 Conn. 390, 56 Atl. 609 (1904):

"* * * but the question before us is not what the parties meant to bind themselves to do nor what they supposed they had bound themselves to do. It is simply what have they, as manifested by their written words, bound themselves to do?" (p. 610). (Underscoring supplied)

The same is true, of course, with Government contracts. As the court stated in United States v. A. Bentley & Sons Co., 293 Fed 229 (Dist. Ct., Ohio, 1923):

"When the government enters into a contract with an individual or corporation, it divests itself of its sovereign character as to that particular transaction and takes that of an ordinary citizen and submits to the same law as governs individuals under like circumstances. * * * The government's contracts are to be interpreted the same as those between individuals to ascertain the intent of the parties and to give the effect accordingly, if that can be done consistently with the terms of the agreement. (p. 235) (Underscoring supplied)

But it would even seem almost impossible that any party actually supposed that the Secretary would be bound to take steps to enforce the Agreement against non-complying signatories. In the first place, it would seem quite unbelievable that the Secretary could ever have meant to be bound in advance to the enforcement of these Marketing Agreements against non-complying parties. Bargaining away such an important phase of his administrative power might conceivably seriously interfere with all of his other functions and duties. For if a great number of signatories were guilty of violating the Agreement, effective enforcement against all of them might possibly consume most of the Secretary's time. Furthermore, it might well be in line with governmental policy, for many reasons, not to fully utilize its enforcement powers. Policies of enforcement may constantly shift and vary. It seems inconceivable that such discretionary action would ever be contracted away by the Secretary. Nor does it seem that any party to the Agreement reasonably expected such an unusual promise from the Secretary.

"Since the governing principle in the formation of contracts is the justifiable assumption by one party of a certain intention on the part of the other, the undertaking of each promisor in a contract must include any promise which a reasonable person in the position of the promisee would be justified in understanding were included." Williston, Contracts, Se. 1293.

It does not seem that there could be any "justifiable assumption" which any "reasonable person" who is a party to this agreement could make to the effect that the Secretary would be obligated to enforce the Marketing Agreement against all non-complying members. And under such circumstances, no such promise can possibly be implied.

IV.

The Theory of Impossibility or Frustration Is Here Not Applicable.

The party signatory involved herein has stated as its reason for its refusal to further perform its obligations that it is "no longer able to sell milk in competition with lower priced milks."

Impossibility of performance, - even because of Act of God - is ordinarily not considered a valid excuse for non-performance except under certain limited circumstances, such as death interfering with the performance of a personal service contract. The reason for this is that contractors must of necessity be held to the strict terms of their contracts, and if the contract does not provide for a release of the obligations imposed by the Agreement by any circumstances rendering performance impossible, then the alleged impossibility of performance will be held to be no excuse. The parties themselves could have foreseen such a contingency and provided for it in the contract. As the court stated in Berg v. Erickson, 234 Fed. 817 (C.C.A. 8th, 1916):

"The general rule is that one who makes a positive agreement to do a lawful act, is not absolved from the liability for a failure to fulfill his contract by a subsequent impossibility of performance caused by an act of God, or an unavoidable accident, because he voluntarily contracts to perform it without any reservation or exception, which, if he desired, he could make in his agreement." (p. 820)

And there is no provision in this contract releasing any party from his obligations if performance should become so burdensome as to be considered by him impossible due to the non-performance of other persons with similar contracts.

Furthermore, there is no impossibility of performance here in the sense in which the doctrine can legally receive any kind of consideration. The subject of the contract still exists. The parties also are still in existence. The most that can be said of the contractor's plight here is that performance has become more burdensome and expensive than was originally anticipated, - according to the party involved, "at considerable loss of both money and customers we have abided by the Agreement." And it is clear that this is not a valid reason for releasing a party to an agreement from the performance of his obligations thereunder. Newport Novm v. McDonald, 109 Ky. 408, 59 S.W. 332 (1900).

A case which merits some consideration in this connection is Baldwin v. Dellwood Dairy Company, 270 N.Y. Supp. 418 (Sup. Ct. 1934). There, the defendant, a milk distributor, refused to comply with an order of the Milk Control Board of New York City which it claimed was confiscating its property because its necessary effect was such as to put it out of business. The Milk Control Board had established a minimum price which such distributors had to pay to producers, and had also established a minimum resale price for the distributors. The resale price order, however, was constantly violated and finally revoked. Defendant then refused to pay the minimum producers' price on the grounds that it could not pay such prices and still stay in business without being protected by a minimum resale price. The court sustained defendant's disregard of the order, and in so doing stated:

"It was not inequitable to challenge the validity of Order 34 (the order fixing the prices to producers) if dealers were being deprived of the benefits of Order 35 (the order fixing the resale prices) either through lack of enforcement or through annulment and specifically if the experience of six months had revealed that compliance with orders had produced only an operating loss to the defendants and others similarly operating in the industry." (At p. 427) (Underscoring supplied)

It thus seems that in the Dellwood case the court considered the lack of enforcement by the Milk Control Board of its orders as an important factor leading to the impossibility of defendant's complying and still remaining in business. The only analogy, however, which can be derived from the Dellwood case is that if a business can under certain circumstances ignore a law because to conform would mean confiscation of its business, it may also ignore a contract to which it is a party on the same theory. But there is no such applicable analogy. A contract is entered into voluntarily. But a law is imposed upon one and must, therefore, conform to constitutional standards. It must not be confiscatory nor, of course, serve to deprive property without due process. Where a law becomes confiscatory through lack of enforcement, it is one matter. When a contract results in imposing great hardship upon one of the contractors because other parties signatory to identical contracts are not complying with the terms of their agreements, then the ordinary rules of contracts apply, divorced from the complicated ramifications of constitutional law.

Nor is the closely allied doctrine that a party to a contract will be excused from performance if he is prevented from performing by the acts of the other party (Hinckley v. Pittsburg Steel Co., 121 U.S. 264 (1887)) here applicable. The contractor in our case is in no way being prevented from performing his obligations under this contract in the sense that this doctrine can be employed. The Government is not, by allegedly failing to enforce, specifically aiming at this particular contractor with the design of preventing performance. In Maxwell v. United States, 3 Fed. (2nd) 906 (C.C.A. 4th, 1925), the defendant relied upon such a defense, claiming that he could not perform his contract with the Government because it was the Government

itself that had prevented him from performing. Defendant in that case agreed to construct a building for the Government, but the war had broken out and the Government had established a large camp near the site of the building defendant agreed to erect. At this camp the Government hired a great number of men within the vicinity as laborers and at prices exceeding those which defendant could afford to pay under the terms of his contract. He further claimed that the large number of men conscripted for the army also served to prevent him from obtaining labor. Defendant, therefore, claimed that the Government itself had prevented him from performing. But the court held that the Government's activity was not specifically aimed at the defendant and that it was general activity, applicable to everyone, and it held defendant's defense invalid. Likewise in Smoot's Case, 82 U.S. 36 (1872), a contractor agreed to furnish the Government with a certain number of horses. At the time the agreement was entered into the Government had certain inspection rules in force. However, shortly thereafter, new inspection rules were promulgated which imposed a greater burden upon the contractor. The contractor claimed that the Government itself made it impossible for him to perform his contract. But the court stated:

"Nor is it claimed that these new regulations were adopted with specific reference to their application to Smoot's contracts. They were a new regulation of the business of inspection of a general character." (p. 44). (Underscoring supplied)

And in our case it is obvious that no attempt is being made to prevent defendant from performing his terms of the contract by not enforcing the other agreements.

V.

The above conclusions are subject to the qualification that if so many other parties signatory are violating the terms of their Agreements as to constitute a substantial failure of consideration, the defense is valid.

There seems little question but that if all the other parties to the Marketing Agreement were not abiding by its terms, then the whole purpose of the Agreement would fall. When mutual promises, and performance, are the consideration for the agreement, then the failure of one party to perform is necessarily a valid defense to the other. As before noted, this Agreement is made not only with the Government, but with all the other parties signatory, and the promises among them are recited as part of the consideration. If all these other parties, or the great majority of them, were violating the Agreement, it seems obvious that there might be such a failure of consideration as to release the complying signatory.

Closely related cases are those dealing with the situation where a party subscribes to the capital stock of a corporation, and the corporation is subsequently never formed and the corporate enterprise is

abandoned. In such a case the subscriber will be released from his contractual obligation. Shield v. Lone Star Life Ins. Co., 202 S.W. 211 (Ct. Civ. App., Tex., 1918); Delaware River & L. R. Co. v. Rowland, 9 Atl. 929 (Pa. 1887). Likewise, in our situation, if so many parties are not complying with the Marketing Agreement as to result in an abandonment of the very purpose of the Agreement, and if the lack of enforcement by the Government is such as to spell out an acquiescence in the abandonment of the object to be obtained by the Agreement, it would seem that the analogy of the corporate cases would follow, and that a signatory would be released from the obligations imposed by the Agreement.

It is well recognized, of course, that in cases involving subscriptions to a common object, the mutual promises of the subscribers constitute a valid consideration for the subscriptions. Furman University v. Weller, 117 S.E. 356 (S. C. 1923). Therefore, one subscriber generally cannot be released without the consent of the others.

"If the effect of the contract is such that each one has the right to insist that every other one shall be held to the performance of his engagements, and the withdrawal of some would place an additional burden upon others, it would seem to follow logically that if part were allowed to withdraw, the others not consenting thereto are thereby released." Thompson, Corporations, Sec. 862.

See also Cast v. King, 112 Pac. 997 (Okla. 1910).

It seems clear that the same conclusion must be arrived at in a situation such as ours. In our case, the Agreement specifically states that each signatory is making the Agreement with each other signatory. A Marketing Agreement represents a common engagement for the accomplishment of an object in which all parties are interested, in much the same way as are subscriptions for a common object. Where the common object cannot be accomplished except by the common performance, it would seem that wholesale violations making it impossible to achieve the common object would mean a failure of consideration, and would be a valid defense in an action against a signatory.

Whether there is such a substantial failure of consideration as to constitute a valid defense would depend, of course, upon the particular facts. However, from the material submitted in connection with this request for an opinion, it would hardly seem as if in this particular situation there were such wholesale violations of the Marketing Agreement in question, - for evaporated milk - as to constitute a valid defense based upon abandonment of purpose, or failure of consideration. It seems that the files of the Agricultural Adjustment Administration contain evidence of violations by only four of the thirty-six parties signatory to this Agreement. It is true that numbers can hardly be the sole test, but that the volume of business transacted by the violating signatories, and their dominant position in the industry in question, must also be important considerations. However, in the light of the

evidence submitted, it does not seem as if the violations which have been committed are such as to create such a situation that a party would be upheld in his contention that the purpose of the Agreement had failed or been abandoned, and that the failure of consideration resulting therefrom constitutes a valid defense for his not complying.

CONCLUSION

The liability of the signatory to the contract is neither expressly conditioned upon other parties complying with their contracts, nor upon the Secretary's taking steps to enforce their Agreements. Nor are such conditions to be implied, because to do so would do violence to the express provisions and the clear intent of the Agreement. That it is the Government that is a party to the Agreement cannot serve to change these conclusions. Nor can the contractor rest upon any claim of impossibility of performance, or frustration. The defense is, therefore, ordinarily invalid. These conclusions, however, are subject to the qualification that if so many other parties signatory are violating the terms of their agreements as to constitute a substantial failure of consideration, and the equivalent of an abandonment of the common enterprise, the defense is valid. It would seem, however, that the facts of this case do not fall within this qualification.

Telford Taylor,
Acting Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 118

PURCHASE OF VARIOUS COMMODITIES FOR RELIEF
DISTRIBUTION

Funds authorized to be appropriated under the Jones-Connally (Cattle) Act may be used for the purchase of dairy products for relief distribution through the Federal Surplus Relief Corporation. These products may be sold by the Corporation only if the sale will result in the distribution of the products for relief purposes, and may not be sold to enter into normal trade channels. Funds authorized by Section 6 of said Act, and funds appropriated by the Emergency Appropriation Act, fiscal year 1935, may be used for the purchase of dairy products for such relief distribution.

Such expenditures for the purchase of dairy products would not require the levy of a processing tax unless made as part of a production control program under Section 8(1) of the Agricultural Adjustment Act.

The Federal Surplus Relief Corporation may borrow funds from the Reconstruction Finance Corporation for the purchase of food, feed, and forage, and these funds can be repaid either out of relief funds or out of the sales of these commodities on the commercial market.

Processing tax funds can be used as a partial source for the purchase of surplus wheat by the Federal Surplus Relief Corporation.

Opinion Section Memorandum No. 169
Dated August 15, 1934.

August 15, 1934.

MEMORANDUM TO MR. CALVIN B. HOOVER,
ECONOMIC ADVISOR.

Your memorandum to Mr. Jerome N. Frank, dated August 11, 1934, requesting an opinion on several questions, has been referred to me, and in reply thereto, I submit the following:

QUESTIONS

1. Can funds from the Jones-Connally Amendment to the Agricultural Adjustment Act be used for the purchase of dairy products for relief distribution through the Federal Surplus Relief Corporation? Could these dairy products be later sold by the Corporation?
2. Can the funds of the LaFollette Amendment also be so used?
3. Can the funds of the "Emergency Appropriation Act, fiscal year 1935" also be so used?
4. Would any of the funds so expended under questions 1, 2, and 3 subsequently have to be covered out of processing tax receipts?
5. Could the Federal Surplus Relief Corporation borrow funds from the Reconstruction Finance Corporation for the purchase of food, feed, and forage, the funds to be paid back later either out of relief funds or out of the sale of these commodities on the commercial market?
6. Could processing tax funds be used as a partial source out of which the Federal Surplus Relief Corporation could purchase surplus wheat from the Pacific Northwest area?

OPINIONS

1. The funds from the Jones-Connally Amendment may be used for the purchase of dairy products for relief distribution through the Federal Surplus Relief Corporation. These dairy products may be later sold by the Corporation only if to do so will result in the products being distributed for relief purposes. The products cannot be sold to enter into normal trade channels.

2. The funds from the LaFollette Amendment may also be so used.
3. The funds from the "Emergency Appropriation Act, fiscal year 1935" may also be so used.
4. Expenditures for the purchase of dairy products made pursuant to the appropriations in questions 1, 2, and 3 would not require the levy of a processing tax, provided that the purchase of such dairy products is not made pursuant to a program for the reduction in the production for market of such dairy products, which is possible both under the Jones-Connally Amendment, and the "Emergency Appropriation Act, fiscal year, 1935." Further, even if taxes are levied pursuant to such a program, the funds under which such benefit payments are made need not be reimbursed out of the proceeds of such taxes.
5. The Federal Surplus Relief Corporation can borrow funds from the Reconstruction Finance Corporation for the purchase of food, feed, and forage, and these funds can be repaid either out of relief funds or out of the sale of these commodities on the commercial market.
6. Processing tax funds can be used as a partial source out of which the Federal Surplus Relief Corporation could purchase surplus wheat from the Pacific Northwest area.

DISCUSSION

I.

The funds from the Jones-Connally Amendment may be used for the purchase of dairy products for relief distribution through the Federal Surplus Relief Corporation. These dairy products may be later sold by the Corporation only if to do so will result in the products being distributed for relief purposes. The products cannot be sold to enter into normal trade channels.

The Jones-Connally Amendment (Sec. 2 of the Cattle Bill, Public, No. 142, 73rd Cong., H.R. 7478) to the Agricultural Adjustment Act reads as follows:

"Sec. 2. Subsection (a) of section 12 of the Agricultural Adjustment Act, as amended, is amended by adding at the end thereof a new paragraph as follows:

"To enable the Secretary of Agriculture to finance, under such terms and conditions as he may prescribe, surplus reductions and production adjustments with respect to the dairy-and beef-cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the markets for the dairy and beef cattle industries, there is authorized

to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$200,000,000: Provided, That not more than 60 per centum of such amount shall be used for either of such industries."

The purposes enumerated in this Amendment, - to reduce surpluses, adjust production, and "to support and balance the market" for the dairy industry - may all be effectuated by the purchase of dairy products. The Amendment also authorizes the carrying out of any of the purposes of Section 12 (b) of the Agricultural Adjustment Act. Under this section, the removal of surplus agricultural products is authorized, and this may also be effectuated by the purchase of dairy products. It is therefore clear that dairy products may be purchased under the Jones-Connally Amendment. (See also Opinions Nos. 143 and 161).

It is also clear that these dairy products so purchased may be distributed for relief purposes through the Federal Surplus Relief Corporation. There is no requirement in the Jones-Connally Amendment, or in the Agricultural Adjustment Act, as to what shall be done with the products acquired pursuant to any of its powers. It seems clear that any disposition consistent with carrying out the purposes of the Act would be proper. Relief distribution through the Federal Surplus Relief Corporation would clearly be such a disposition.

The question whether these dairy products could later be sold by the Corporation, depends upon the terms under which the products are acquired by it from the Agricultural Adjustment Administration.

By an arrangement now existing between the Secretary of Agriculture and the Federal Surplus Relief Corporation, made in the form of a letter dated July 2, 1934, from the Secretary to the Corporation, it is provided that the Agricultural Adjustment Administration is purchasing dairy cattle to effect a removal of surplus of such cattle, and that it is arranging "to make such surpluses available for the relief of the needy and underfed throughout the country". The Secretary further stated that, "I propose to donate such cattle to the * * * Federal Surplus Relief Corporation, for distribution through proper relief channels as you shall direct", and it is reiterated that "all such cattle will be distributed by you for relief purposes". It is then specifically declared that:

"It is understood that such cattle and the products thereof, after being donated by me to the * * * Federal Surplus Relief Corporation shall not re-enter into normal trade channels."

If the dairy products involved herein are thus being purchased pursuant to the removal of surplus of dairy cattle effectuated under this agreement it is clear that a sale could be made of the dairy products by the corporation only if to do so would effect the terms of the agreement. It is, of course, conceivable that relief distribution could be effected by a sale of the dairy products to some other relief organization.

Only a sale in furtherance of relief distribution could thus be proper, and not one which would result in the products re-entering normal trade channels, which is expressly prohibited by the Agreement. Nor would it seem that the provision in the letter stating that "all such cattle will be distributed by you for relief purposes" means that the actual distribution to the needy must be effected by the Surplus Relief Corporation itself. Its proper interpretation would seem to be that it shall be the Corporation which will be the means to effect the relief distribution, and it seems that the Corporation could thus be the means under the terms of a proper sale to another relief organization.

The conclusion that a sale of the products by the Corporation can be made only in furtherance of relief distribution must stand even though the dairy products here in question are not those being purchased pursuant to the specific removal program set out above. Under a general agreement entered into by the Secretary of Agriculture and the Corporation, through an exchange of letters dated October 24, 1933, and November 10, 1933, it is agreed that the relations of the Corporation to the Agricultural Adjustment Administration should be such as "to transfer basic farm surpluses from the open market to unemployed families on relief, who will consume them and thus keep them off the market." It is further stated that the purchases will be made only in "such quantities as can be used for relief families over and above prior consumption." Therefore, pursuant also to this general agreement, products coming into the possession of the Corporation through Agricultural Adjustment Act activities could be sold only if to do so would further relief distribution and not re-enter the commercial market.

Although it is possible that a sale of the products may be in furtherance of a program of relief distribution, so as to be proper both under the general and specific agreements above referred to, it seems that it would be well for clarification purposes to amend these agreements so as to leave no doubt but that a sale resulting in the effectuation of relief distribution is authorized. A sale of the products by the Corporation may not seem a practical method of the Corporation's working out its relief problems. And there is always a possibility of the contention that a sale of the products by the Corporation was not contemplated, and is in conflict with the terms or spirit of the agreements, especially that one in which it is specifically stated that "all such cattle will be distributed by you for relief purposes". While this is unlikely, it is suggested that the clearing up of any doubt could be easily made and would be desirable.

There is no question, of course, but that if it is determined that a sale would be proper to effectuate the relief purposes of the agreements, the Corporation would have the power to engage in such sales. Among the extremely broad powers appearing in this Corporation's Certificate of Incorporation is the specific power "to sell or otherwise dispose of any and all agricultural and/or other commodities, and/or products thereof" that it has acquired. (Sec. 3 (i)).

II.

The funds from the LaFollette Amendment may also be so used.

The LaFollette Amendment (Sec. 6 of the Cattle Bill) reads as follows:

"There is authorized to be appropriated the sum of \$50,000,000 to enable the Secretary of Agriculture to make advances to the Federal Surplus Relief Corporation for the purchase of dairy and beef products for distribution for relief purposes, * * *."

Thus, under this Amendment "the purchase of dairy products for distribution for relief purposes" through the Federal Surplus Relief Corporation is specifically authorized.

III.

The funds from the "Emergency Appropriation Act, fiscal year 1935" may also be so used.

The pertinent part of this Appropriation Act reads as follows:

"Emergency Relief

"To meet the emergency and necessity for relief in stricken agricultural trade, to remain available until June 30, 1935, \$535,000,000, to be allocated by the President to supplement the appropriations heretofore made for emergency purposes and in addition thereto for (1) making loans to farmers for, and/or (2) the purchase, sale, gift, or other disposition of, seed, feed, freight, summer fallowing and similar purposes; * * *."

Although the purchase of dairy products is not specifically authorized by this appropriation Act, it has already been determined that its correct construction compels the conclusion that such activity is proper if it will result in meeting "the emergency and necessity for relief in stricken agricultural areas". See Opinion No. 143; also see Decision Comp. Com., A-56438, August 6, 1934.

IV.

Expenditures for the purchase of dairy products made pursuant to the appropriations in questions 1, 2, and 3 would not require the levy of a processing tax, provided that the purchase of such dairy products is not made pursuant to a program for the reduction in the production for market of such dairy products, which is possible both under the Jones-Connally Amendments, and the "Emergency Appropriation Act, fiscal year, 1935." Further, even if taxes are levied pursuant

to such a program, the funds under which such benefit payments are made need not be reimbursed out of the proceeds of such taxes.

Neither the Jones-Connally Amendment, the LaFollette Amendment, nor the "Emergency Appropriation Act, fiscal year 1935", make any requirement that processing taxes shall be levied pursuant to the activities authorized thereunder.

Only when a reduction in production for market program is being carried out under Section 8 (1) of the Agricultural Adjustment Act, for which benefit payments are made, is it necessary to levy processing taxes (Sec. 9 (a), Agricultural Adjustment Act). Such a reduction in production for market program may possibly be carried out under the Jones-Connally Amendment, which authorizes the carrying out of any of the purposes of Section 12 (b) of the Agricultural Adjustment Act, because that Section provides that the funds therein appropriated may be employed for benefit payments. Such a benefit payment program could also be financed under the "Emergency Appropriation Act, fiscal year 1935," if to do so would afford relief to stricken agricultural areas, for this Act appropriates funds "to supplement the appropriations heretofore made for emergency purposes", and the appropriations made by the Agricultural Adjustment Act were "emergency" appropriations.

Therefore, if a reduction in production for market program, pursuant to Section 8 (1) of the Agricultural Adjustment Act, is so initiated from the Jones-Connally funds, or from the "Emergency Appropriation Act" funds, processing taxes would have to be levied. But, as we have seen, it is possible to purchase cattle under these two Acts pursuant to programs other than one for the reduction in production for market. (See Opinion No. 161). Under such circumstances, no processing tax would be necessary.

It should also be pointed out, however, that if a reduction in production for market program is instituted pursuant to the Jones-Connally Amendment or the "Emergency Appropriation Act", so that a processing tax is required, it is not necessary that the appropriations be "covered out of the proceeds of these taxes in the sense that these particular funds need be reimbursed out of such taxes. The Act only requires that when benefit payments are made, taxes shall be levied. It makes no requirement as to what must be done with the taxes after they are collected. On the other hand, the Act does authorize the use of the taxes for purposes other than the payment of benefit payments. If these appropriations are, therefore, properly used to pay benefit payments pursuant to a reduction in production for market program, there is no requirement that they shall be reimbursed out of the proceeds of processing taxes levied pursuant to such a program.

V.

The Federal Surplus Relief Corporation can borrow funds from the Reconstruction Finance Corporation for the purchase of food, feed, and forage, and

these funds can be repaid either out of relief funds or out of the sale of these commodities on the commercial market.

The Federal Surplus Relief Corporation is specifically empowered to borrow funds to carry out any of its purposes (Certificate of Incorporation, Sects. 3 (1) and (m)). The purchase of food, feed, and forage would be a proper activity under a number of the specific powers of the Corporation, such as the "expansion of markets for, removal of, and increasing and improving the distribution of, agricultural commodities and products" (Cert. of Inc., Sec. 3 (a)), as well as pursuant to the power given to the Corporation to perform any of the functions of the Agricultural Adjustment Act, or certain relief Acts. (Cert. of Inc., Sec. 3 (c)).

Also, the Corporation is specifically authorized to dispose of or remove agricultural commodities or products which it has acquired through borrowed money "through orderly marketing in the United States and/or elsewhere" (Cert. of Inc., Sec. 3 (m)). It could certainly, therefore, repay the loan from the Reconstruction Finance Corporation by the sale of the food, feed, and forage on the commercial markets. There also seems no question but that loans from the Reconstruction Finance Corporation could be repaid out of relief funds whenever the Corporation properly acquires such funds. Once the Corporation acquires any property, it is broadly given the power to "transfer" or "assign" it (Cert. of Inc., Sec. 3 (1)), and it is also authorized "to take and hold for any of its purposes, by * * * gift, * * * any property * * *" and "to own, operate, manage, lease, mortgage, pledge, sell, assign and transfer or otherwise dispose of and exercise all provisions of ownership over such property * * *." (Cert. of Inc., Sec. 3 (c)). Thus, any funds which the Corporation acquires as a result of other relief appropriations can be employed pursuant to any of the powers of the Corporation, such as the repayment of its loans, provided, of course, that the grant under which the relief funds are made to the Corporation do not prohibit the use of the funds for such purpose.

VI.

Processing tax funds can be used as a partial source out of which the Federal Surplus Relief Corporation could purchase surplus wheat from the Pacific Northwest area.

Section 12 (b) of the Agricultural Adjustment Act in terms permits the use of the funds derived from processing taxes for the "removal of surplus agricultural products". Therefore, processing tax funds could be used to remove surplus wheat from the Pacific Northwest Area.

That the funds are to be used only to partially pay for the wheat is immaterial. The means by which the Secretary chooses to remove a surplus commodity are solely within his discretion, and he may elect to effect the purpose of Section 12 (b) by supplementing funds of another corporation or department (See Opinion No. 71).

Telford Taylor,
Acting Chief, Opinion Section,
Office of the General Counsel.

No. 119

EFFECT OF LICENSES UPON PRE-EXISTING CONTRACTS

Section 8(3) of the Agricultural Adjustment Act should be construed to mean that licenses issued thereunder shall have application to contracts between private parties entered into prior to the passage of the Agricultural Adjustment Act.

Section 8(3) of the Agricultural Adjustment Act, so construed, is not unconstitutional.

Opinion Section Memorandum No. 188
Dated August 18, 1934.

August 18, 1934.

MEMORANDUM TO MR. PRESSMAN

In accordance with your oral request I submit my opinion upon the following:

QUESTION

Can licenses issued under Section 8 (3) of the Agricultural Adjustment Act modify or render illegal the continued performance of contracts between private parties entered into prior to the passage of the Agricultural Adjustment Act?

OPINION

Licenses issued under Section 8 (3) of the Agricultural Adjustment Act may include provisions the effect of which will be to modify or render illegal the continued performance of such contracts.

DISCUSSION

The effect of licenses upon contracts to which a state government or a municipality or the Federal government is a party is a question not within the scope of this opinion. Nor will the question of the rights inter se of the parties to contracts the continued performance of which has become illegal be here discussed, as the legal possibilities in this particular are too numerous to be treated except in connection with specific cases.

Section 8 (3) of the Agricultural Adjustment Act should be construed to mean that licenses issued thereunder shall have application to preexisting contracts.

The general rule is well-established that a statute will not ordinarily be construed as retroactive or retrospective. The courts are reluctant to read such an interpretation into statutes, and, unless the language shows that such was the intention of the legislature, or that no other construction will make the act effective, they will ordinarily interpret an act as prospective in operation only. United States v. Heth, 3 Cranch 398, 413 (1806); Twenty Percent Cases, 20 Wall. 179, 187 (1873); United States v. Burr, 159 U.S. 78 (1895); United States v. United Shoe Machinery Co., 264 Fed. 138, 169 (E.D. Mo. 1920).

However, the courts have not required that it be expressly stated in a statute that it is to apply to existing contracts. Particularly

where a statute has enacted an important rule of public policy, they have held that the continued performance of such contracts is prohibited by the statute, even though no express provision to that effect is included. Thus in Louisville & Nashville R. Co. v. Mottley, 219 U.S. 437 (1911), the court stated that it was the object of the Interstate Commerce Act to eradicate all forms of discrimination and inequality in transportation charges, and therefore declared that the intent of Congress that the act should apply to existing contracts was made clear.

" * * * when, without making any exception of existing contracts, it forbade by broad, explicit words any carrier to charge, demand, collect or receive a 'greater or less or different compensation' * * * . The court cannot add an exception based on equitable grounds when Congress forbore to make such an exception." (at page 478)

The same technique of looking to the object of the statute and then noting the absence of any express exception for the benefit of existing contracts was employed in Adams Express Co. v. United States, 212 U.S. 522 (1908), and Armour Packing Co. v. United States, 209 U.S. 56 (1908), where the Supreme Court was construing the Interstate Commerce Act and the Elkins Act. In Philadelphia, Baltimore & Washington R.R. v. Schubert, 224 U.S. 603 (1912), the Court examined the legislative history of the Employers' Liability Act for light upon its object, noted the general terminology therein used, and then concluded that "only by such general application [to existing as well as subsequent contracts] could the statute accomplish the object which it is plain the Congress had in view".

While there has been conflict in the decisions with reference to this question under the Clayton Act, it has been held in two cases that it is to be construed as applying to contracts the making of which antedated passage of the Act. Elliott Machine Co. v. Center 227 Fed. 124 (W.D. Mich. 1915); Motion Picture Patents Co. v. Universal Film Mfg. Co., 235 Fed. 398 (C.C.A. 2d, 1916). The contrary decision reached in United States v. United Shoe Machinery Co., 264 Fed. 138 (E.D. Mo. 1920), was based upon a construction of the language of the Act which emphasized its use of the future tense in providing that "it shall be unlawful for any person * * * to make such contracts" and the contrast of this phraseology to the language of the Employers' Liability Act which provides that "any contract * * * shall be void".

Section 8 (3) of the Agricultural Adjustment Act empowers the Secretary of Agriculture

"To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict

with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof. The Secretary of Agriculture may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. Any order of the Secretary suspending or revoking any such license shall be final if in accordance with law. Any such person engaged in such handling without a license as required by the Secretary under this section shall be subject to a fine of not more than \$1,000 for each day during which the violation continues."

That the Agricultural Adjustment Act is an expression of national policy and of broad application is clear from the declarations of emergency and of policy contained in Sections 1 and 2 of the Act. In pursuance of the declared policy, Section 8 (3) requires that licenses issued thereunder shall be subject to such terms and conditions as may be necessary to eliminate unfair practices or charges. It is doubtful whether unfair practices can be eliminated if legislation tending to that end cannot be effective with respect to existing contracts. The prevalence of long-term contracts for distribution and long-term leases and corporate financial arrangements set up with a view to permanency renders it unlikely that trade practices can be affectively controlled if arrangements made prior to the passage of the Agricultural Adjustment Act are to be left untouched merely because they have been set up by a contract.

It is even more doubtful that economic conditions in marketing can be remedied if the long-term financial arrangements prevalent in many industries are to be exempted from the operation of the Act. That the Act had such arrangements in mind is supported by the fact that, according to Section 8 (3), restoration of normal economic conditions is to take place in the "financing" of agricultural commodities and products. Contracts made with a view to financing are quite likely to antecede contracts providing for subsequent distribution. In some cases, of course, they are inextricably intermingled.

In respect to its effect upon existing contracts, therefore, the Agricultural Adjustment Act is to be compared with such statutes as the Interstate Commerce Act, the Elkins Act, the Employers' Liability Act, and the Sherman and Clayton Acts. As has been shown, these acts have been interpreted to prohibit continued performance of private contracts inconsistent with the terms of the statutes.

The only section of the Agricultural Adjustment Act which takes into consideration existing contracts in Section 18, which deals with the processing tax. While the problems arising in connection with

processing taxes are quite distinct from those in connection with the issuance of licenses, nevertheless the very existence of a section labelled "existing contracts" in the Agricultural Adjustment Act indicates that the lawmakers were aware of the existence of this sort of problem, and the failure of Congress to exempt such contracts from the operation of Section 8 (3) the more strongly suggests that it intended no such exception.

I conclude, therefore, that Section 8 (3) of the Agricultural Adjustment Act should be construed to mean that licenses issued thereunder shall apply to preexisting contracts and acts performed pursuant to such contracts.

II

Section 8 (3) of the Agricultural Adjustment Act, if construed as heretofore indicated, is not unconstitutional.

- A. Article I, Section 10 of the Constitution, prohibiting impairment of the obligation of contracts, does not apply to Federal legislation.

Article I, Section 10 of the Constitution provides in part that:

"No State shall * * * Pass any * * * Law impairing the Obligation of Contracts * * *."

The proposition that the impairment of contracts clause has specific application to state governments and is not a limitation on Federal action is apparent from the face of the provision, and has frequently been approved by the courts. See The Sinking-Fund Cases, 99 U.S. 700, 718 (1878); New York v. United States, 257 U.S. 591 (1922); Bloomer v. Stolley, Fed. Cas. No. 1559 (C.C.D. Ohio 1850); Hammons v. Watkins, 232 Pac. 616 (Arizona 1927); Michigan Central R. Co. v. Slack, Fed. Cas. No. 9527a (C.C.D. Mass. 1876); Evans-Snider-Buel Co. v. McFadden, 105 Fed. 293, 297 (C.C.A. 8th, 1900); Mortz v. Miller, 285 Fed. 778, 780 (S.D. N.Y. 1921), aff'd 285 Fed. 781 (C.C.A. 2d, 1922).

It should, however, be noted that Federal statutes ostensibly directed against contract rights may be questioned under the Fifth Amendment to the Constitution, which forbids the passage of any Federal statute which deprives any person of property without due process of law. Lynch v. United States, 54 S.Ct. 840 (1934); In re Sabin's Estate, 131 Misc. 451, 227 N.Y. Supp. 120 (1928), rev'd on other grounds 224 App. Div. 702, 228 N.Y. Supp. 890 (1928); cf. 22 Op. Atty. Gen. 192 (1898). This aspect of the present question will be dealt with in detail below.

- B. Congress, in the exercise of its power under the Constitution, may pass laws which affect and impair the obligation of existing private contracts.

In Mitchell v. Clark, 110 U.S. 633 (1884), which dealt with certain defenses available to public officers in actions against them for acts

performed under orders during the Civil War, the Supreme Court clearly indicated that, where a statute is grounded upon a recognized constitutional power, its effect upon existing contracts is not relevant to the question of power to pass such a statute:

" * * * where the question of the power of Congress arises, as in the legal tender cases, and in bankruptcy cases, it does not depend upon the incidental effect of its exercise on contracts, but on the existence of the power itself." (at page 643)

Under the currency power it was early held that Congress might modify the laws relating to legal tender, and that such modification was effective as to existing contracts. Legal Tender Cases, 79 U.S. 457 (1870). In the course of its opinion the Court Stated:

"Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power. Nor is this singular. A covenant for quiet enjoyment is not broken, nor is its obligation impaired by the government's taking the land granted in virtue of its right of eminent domain. The expectation of the covenantee may be disappointed. He may not enjoy all he anticipated, but the grant was made and the covenant undertaken in subordination to the paramount right of the government.

* * *

"Directly it may, confessedly, by passing a bankrupt act, embracing past as well as future transactions. This is obliterating contracts entirely. So it may relieve parties from their apparent obligations indirectly in a multitude of ways. It may declare war, or, even in peace, pass nonintercourse acts, or direct an embargo. All such measures may, and must operate seriously upon existing contracts, and may not merely hinder, but relieve the parties to such contracts entirely from performance. It is, then, clear that the powers of Congress may be exerted, though the effect of such exertion may be in one case to annul, and in other cases to impair the obligation of contracts." (at page 549)

It is in the exercise of its power to regulate commerce that Congress has perhaps most frequently acted in such a way as to nullify the provisions of existing contracts. This is illustrated by cases upholding the validity, as against conflicting contractual obligations, of

statutes or regulations prohibiting rebates, concessions or discriminatory freight rates. Armour Packing Co. v. United States, 257 U.S. 591 (1922); Lewis, Leonhardt & Co. v. Southern Ry. Co., 217 Fed., 217 Fed. 321, 324 (C.C.A. 6th, 1914); W.M. Carter Planing Mill Co. v. New Orleans, M. & C. R. Co., 112 Miss. 148, 72 So. 884 (1916). Contracts providing for free passes must also yield to the statutory provision against receiving "a greater or less or different compensation" for the transportation of persons or property than that specified in the published schedule of rates. Louisville & Nashville R. Co. v. Mottley, 219 U.S. 467 (1911); Louisville & Nashville R. Co. v. Crowe, 160 S. W. 759 (Ky. 1913); Bell v. Kanawha Traction & Electric Co., 98 S.E. 885 (W. Va. 1919). The Employers' Liability Act superseded prior contractual arrangement inconsistent with its terms. Philadelphia, Baltimore & Wash. R.R. v. Schubert, 224 U.S. 603 (1912). An agreement in restraint of trade, although lawful when made, became illegal on the passage of the Sherman Act. United States v. Trans-Missouri Freight Assoc., 166 U.S. 290 (1897). Prior contracts have also been held subject to the provisions of the Clayton Act. Motion Picture Patents Co. v. Universal Film Mfg. Co., 235 Fed. 398 (C.C.A. 2d, 1916); Elliott Machine Co. v. Center, 227 Fed. 124 (W.D. Mich. 1915). But cf. United States v. United Shoe Machinery Co., 264 Fed. 138 (E.D. Mo. 1920). (basing its decision on a construction of the language of the Act and not on constitutional grounds).

The considerations which underlie decisions upholding the power of Congress to override the terms of prior contracts are stated in the Schubert case, supra, in the following terms:

" * * * The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the Territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority."

Despite the fact that the state governments are subject to the Constitutional prohibition against impairment of the obligation of contracts, state legislation modifying or declaring illegal further

performance of existing contracts has been frequently sustained by the courts. These decisions have enunciated the rule that contracts are made subject to a valid exercise of the police power of the state, and that therefore state laws may subject existing contracts to their provisions without infringing the obligation of contracts clause. This distinction has been recently expressed by the Supreme Court in Sproles v. Binford, 286 U.S. 374 (1932):

" * * * Contracts which relate to the use of the highways must be deemed to have been made in contemplation of the regulatory authority of the State. With respect to the power of Congress in the regulation of interstate commerce, this Court has had frequent occasion to observe that it is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation of interstate commerce in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. Louisville & Nashville R. Co. v. Mottley, 219 U.S. 467, 482; Philadelphia, B. & W.R. Co. v. Schubert, 224 U.S. 603, 613, 614; New York Central & Hudson River R. Co. v. Gray, 239 U.S. 583; Continental Ins. Co. v. United States, 259 U.S. 156, 171. The same principle applies to state regulations in the exercise of the police power. Rast v. Van Deman & Lewis, 240 U.S. 342, 363; Union Dry Goods Co. v. Georgia Public Service Comm., 248 U.S. 372, 375, 376; Producers Transportation Co. v. Railroad Comm., 251 U.S. 228, 232; Sutter Butte Canal Co. v. Railroad Comm., 279 U.S. 125, 137, 138; Morris v. Duby, supra." (at pages 390-391)

In St. Paul & Tacoma Lumber Co. v. Northern Pacific Ry. Co., 296 Fed. 749 (W.D. Wash. 1924), where the validity of a state rate regulation as applied to existing contracts was called in question, the court refused to assent to a proposed distinction of rate cases arising under the interstate commerce power of Congress, and relied upon a quotation from Raymond Lumber Co. v. Raymond Light & Water Co., 92 Wash. 330, 159 Pac. 133:

"It will be noticed that two of the cases cited and quoted from are based upon the commerce clause of the federal Constitution. But the principle is the same. The commerce clause of the Constitution is a delegation of power to the United States. The federal Supreme Court holds that contracts valid when entered into are made subject to the subsequent exercise of the power of Congress. The police power of the state is not a delegated, but a reserved power.

The cases of Chicago, B. & Q.R. Co. v. Nebraska, and Milwaukee Electric, etc. Co. v. Wisconsin Railroad Commission, supra, are cases involving the exercise of the police power of the state; and the rule is the same, whether the contract be one which is within the commerce clause of the federal constitution or one which is within the police power of the state. In one case, it is subject to the laws subsequently passed by Congress; and in the other, it is subject to the laws subsequently passed by the state Legislature. The clause of the federal Constitution which provides that no law shall be passed which impairs the obligation of a contract is not applicable to legislation within the scope of the police power."

The right of the states to regulate intrastate railroad rates, and to enforce such rates even with respect to acts under existing contracts, has been consistently sustained. Portland Railway, L. & P. Co. v. Railroad Comm. of Oregon, 229 U.S. 397 (1913); Carson Lumber Co. v. St. Louis & S.F. Railroad Co., 198 Fed. 311 (E.D. Okla. 1912); Chicago, B. & Q.R. Co. v. Iowa, 94 U.S. 155 (1876). The same is true as to oil pipe line rates, and charges for supplying electrical power. Producers Transportation Co. v. Railroad Comm. of California, 251 U.S. 228 (1920); Union Dry Goods Co. v. Georgia Public Service Corp., 248 U.S. 372 (1919).

Cases declaring the extent of the state power with reference to existing contracts are by no means confined to the field of rate regulation. A number of cases have held that state liquor laws may invalidate leases where, by the terms of the lease, use of the premises is restricted to certain acts prohibited by the liquor laws. Halloran v. Jacob Schmidt Brewing Co., 162 N.W. 1082 (Minn. 1917) Brunswick-Balke-Collender Co., v. Seattle Brewing & M. Co., 98 Wash. 12, 167 Pac. 58 (1917); Heart v. East Tennessee Brewing Co., 121 Tenn. 69, 113 S.W. 364 (1908); Hooper v. Mueller, 158 Mich. 595, 123 N.W. 24 (1909). The same conclusion was reached under the National Prohibition Act. Doherty v. Monroe Eckstein Brewing Co., 196 App. Div. 708, 187 N.Y. Supp. 633 (1921); Kaiser v. Ziegler, 187 N.Y. Supp. 658 (1921). A few cases have held that such laws do not invalidate a lease or relieve the tenant of the obligation of paying rent, even though under the statute any further use of the premises would be illegal. Hecht v. Acme Coal Co., 19 Wyo. 18, 113 Pac. 788 (1911); J.J. Goodrun Tobacco Co. v. Potts-Thompson Liquor Co., 133 Ga. 776, 66 S.E. 1081 (1910). But no cases have held state liquor laws ineffective with respect to existing leases.

Other cases under state statutes deal with quite diverse situations. In Atlantic Coast Line R. Co. v. Finn, 195 Fed. 685 (C.C.A. 4th, 1922), it was held that a state liability statute providing that the acceptance by an employee of benefits from a relief department shall not bar a recovery is effective, notwithstanding existing contracts to the contrary. In Ridge v. Miller, 47 S.W. (2d) 587 (Ark. 1932), the president of a school board who had contracted to transport pupils to school was held not entitled to compensation as a result of the subsequent enactment

of a statute making such contracts by any member of a school board null and void. See also School District No. 16 of Sherman County v. Howard, 5 Neb. Unoff. 340, 98 N.W. 666 (1904). In Cordes v. Miller, 39 Mich. 581 (1877), a covenant in the lease of a wooden building binding the landlord to rebuild in case the building burned was held released by the passage of a valid municipal ordinance forbidding the erection of wooden buildings. See also Poledor v. Mayerfield, 173 N.E. 292 (Ind. App. 1930).

The conclusion that license provisions under Section 8 (3) of the Agricultural Adjustment Act may be given effect with respect to acts performed under preexisting contracts is not, in my opinion, impugned by the recent decision of the Supreme Court in Lynch v. United States, 54 S. Ct. 840 (June 4, 1934). In this case, action was brought against the United States in the Federal courts upon a policy for yearly renewable term insurance issued to the plaintiff's decedent pursuant to the War Risk Insurance Act. The United States demurred upon the ground that consent to be sued had been withdrawn by Section 17 of the so-called Economy Act, approved March 20, 1933. That section provided, in part, that:

" * * * All laws granting or pertaining to yearly renewable term insurance are hereby repealed * * *."

The Supreme Court, speaking through Mr. Justice Brandeis, held that the intended effect of this statute was not to destroy the remedy by withdrawing the sovereign consent to be sued but to take away the contract right, that rights arising out of a contract with the United States are property rights and protected by the due process clause, and that a statute which purported to take away that right in the name of economy alone was invalid under the Fifth Amendment to the Constitution. That the Court had no intention, and expressly avoided any implication, of deciding that Congress has no power to pass laws the effect of which may be to deprive persons of contract rights is clear from the following portion of the opinion:

"The Solicitor General does not suggest either in brief or argument, that there were supervening conditions which authorized Congress to abrogate these contracts in the exercise of the police or any other power. The title of the Act of March 20, 1933, repels any such suggestion. Although popularly known as the Economy Act, it is entitled an 'Act to maintain the credit of the United States'. Punctilious fulfilment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenue and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by

abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but the act of repudiation. "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen." The Sinking Fund Cases, 99 U.S. 700, 719."

The first sentence of the foregoing quotation must constitute recognition of what had long been regarded as well-settled: that Congress in the exercise of its powers may, where necessary to the proper execution of those powers for the benefit of the public, abrogate or modify contract rights. In such instances, and clearly under Section 8 (3) of the Agricultural Adjustment Act, the effect of the statute upon contracts is purely incidental to the accomplishment of a proper Federal purpose. But the sole object toward which the statute in question in the Lynch case was directed was relief from the burden of the obligation. This the Court held to be no proper exercise of the power to maintain the credit of the United States. In addition, it should be noted that the Court may well have been influenced in its conclusion by doubt whether Congress had really intended the result accomplished by the language of the statute for, in Mr. Justice Brandeis' words:

"In order to promote efficiency in administration and justice in the distribution of War Risk Insurance benefits, the Administration was given power to prescribe the form of policies and to make regulations. The form prescribed provided that the policy should be subject to all amendments to the original Act, to all regulations then in force or thereafter adopted. Within certain limits of application this form was deemed authorized by the Act, United States v. White, 270 U.S. 175, 180, and, as held in that case, one whose vested rights were not thereby disturbed could not complain of subsequent legislation affecting the terms of the policy. Such legislation has been frequent. Moreover, from time to time, privileges granted were voluntarily enlarged and new ones were given by the Government. But no power to curtail the amount of the benefits which Congress contracted to pay was reserved to Congress; and none could be given by any regulation promulgated by the Administrator. Prior to the Economy Act, no attempt was made to lessen the obligation of the Government. Then, Congress, by a clause of thirteen words included in a very long section dealing with gratuities,

repealed 'all laws granting or pertaining to yearly renewable term insurance'. The repeal, if valid, abrogated outstanding contracts; and relieved the United States from all liability on the contracts without making compensation to the beneficiaries.

* * *

"War Risk Insurance and the war gratuities were enjoyed, in the main, by the same classes of persons; and were administered by the same government agency. In respect of both, Congress had theretofore expressed its benevolent purpose perhaps more generously than would have been warranted in 1933 by the financial condition of the Nation. When it became advisable to reduce the Nation's existing expenditures, the two classes of benevolences were associated in the minds of the legislators; and it was natural that they should have wished to subject both to the same treatment. But it is not to be assumed that Congress would have resorted to the device of withdrawing the legal remedy from beneficiaries of outstanding yearly renewable term policies if it had realized that these had contractual rights. It is, at least, as probable that Congress overlooked the fundamental difference in legal incidents between the two classes of benevolences dealt with in § 17 as that it wished to evade payment of the Nation's legal obligations."

In conclusion, a few cautionary observations must be made. This opinion is not directed to the question of what effect licenses and particular provisions thereof may be held to have upon the rights of parties to preexisting contracts between themselves. All that is now decided is that performance of acts forbidden by a license will be illegal even though such acts are done pursuant to previous agreement. The question of the rights of the parties inter se will vary according to the nature of the particular contract or license provision involved. In some cases the contract may be held to be completely terminated. In other instances, the decision may be governed by an analogy to certain rate cases which have held preexisting contracts not to be terminated but to be modified in accordance with rate regulations. Suburban Water Co. v. Borough of Oakmont 268 Pa. 243, 110 Atl. 778 (1920). Some contracts may be held to be severable, and to remain in effect as to such provisions as are not in conflict with the licenses. It is possible that, where revocation of a license prevents a party from fulfilling his contract, the agreement will be held merely to be suspended pending recovery of the right to do business. Finally, there will in many cases be serious question whether the courts will hold a contract to continue in effect despite the fact that performance has been rendered exceedingly burdensome by reason of a license provision, or whether they will hold that the obligation to perform has been removed by the license. The answers to these and related questions must await the submission of specific cases.

I conclude that licenses may be issued under Section 8 (3) of the Agricultural Adjustment Act the provisions of which will abrogate or modify the rights of parties to preexisting private contracts.

Telford Taylor,
Acting Chief, Opinion Section,
Office of the General Counsel.

RIGHTS OF TOBACCO DEMONSTRATORS UNDER FLUE-CURED
TOBACCO ADJUSTMENT CONTRACTS

The tobacco demonstrator is not a share-cropper. He is a joint-venturer, and is co-tenant of the crop.

Where a tobacco production adjustment contract calls for reduction of acreage below the minimum guaranteed by the demonstrator's prior contract with the producer, the demonstrator's consent is essential to the effectuation of the purpose of the acreage reduction program. In that case, the demonstrator becomes one of the intended beneficiaries of the contract and whatever promises are made to him by the producer in exchange for his consent to the adjustment contract will be enforceable under the contract against the producer by the demonstrator and by the Secretary.

Where the demonstrator's prior right is not thus defeated by the adjustment contract, he has no valid claim arising out of the contract, even though he may have participated in the designation of the trustee under the contract and even though he may be designated as share-cropper or share-tenant.

The demonstrator may, nevertheless, have valid claims to a portion of the equalization payment arising under independent agreements with the producer. Such claims are controlled entirely by the local law and by the individual circumstances. It would not be proper to render an opinion or issue an Administrative Ruling controlling such claims.

The Administration should make payment in the manner described in Paragraphs 23 and 24. The trustee under these paragraphs should distribute the payment to the persons designating him, as their interests may appear. If the demonstrator is privy to the contract, his participation in the designation of trustee must be recognized. The trustee may protect himself by interpleader.

If the demonstrator is not privy to the contract and does not, therefore, participate in the equalization payment, the equalization payment must not be based upon his share of the 1933 crop.

August 22, 1934

MEMORANDUM TO MR. LANIER
Administrative Rulings, Tobacco Section

ANALYSIS OF TOBACCO DEMONSTRATORS' CLAIMS UNDER FLUE-CURED
TOBACCO ADJUSTMENT CONTRACT.

I.

A tobacco demonstrator is an expert tobacco grower who directs the cultivation and marketing of tobacco, supplying fertilizer, twine, poison, in exchange for an undivided interest in the crop. He frequently supplies seed, and to some extent he may finance the operations. The producer binds himself to follow the instructions of the demonstrator. The relationship between the demonstrator and the producer is an independent contract relationship which may be fairly described as a joint venture.

A share-cropper is a mere laborer. The relationship of the producer and share-cropper is that of master and servant. The demonstrator is not a share-cropper, since he has independent superintendence of all operations in the production of the tobacco.

II.

The 1934 contract provides for three distinct payments by the Secretary. The first payment is a rental payment going to the producer alone and need not concern us. The other two are the adjustment payment and the price-equalization payment.

III.

Consider first the adjustment payment. Paragraph 19 defines its amount. It is measured by the market value of the crop. Paragraph 23 prescribes the manner of making adjustment payments:

"(a) Each adjustment payment provided for by this contract shall be paid to the producer unless the tobacco produced on this farm in 1934 is produced with the aid of share tenants and/or share croppers. (b) In the event that such tobacco is produced with the aid of share-tenants and/or share croppers each adjustment payment shall be paid to the producer if designated as trustee (or to such other person as may be designated as trustee) by the producer and such share tenant and share cropper on this farm as have at the time of such designation an interest in the tobacco produced on this farm in 1934 or in the proceeds therefrom. (c) Such designation shall be on forms to be approved by the Secretary. (d) Said trustee shall distribute such payment to those so

designating him as trustee, as their interests may appear, in the same proportion as the net market values of the respective shares of such persons in the tobacco produced on this farm in 1934 bear to the net market value of the total amount of such tobacco." (Letters supplied)

IV.

Payments are thus to be made in the first instance to the producer or to a trustee designated by the producer, the share-croppers, and share-tenants. It would ordinarily be a fair inference that the persons beneficially interested in the contract include only the producer, the share-tenants and share-croppers. The language is not determinative of this point, however, and a consideration of the structure of the adjustment program will show that that inference is improper.

Payments under the adjustment contracts are made for a reduction of acreage in production. They are to be made to those persons whose cooperation is essential to the effectuation of such reduction. Payment is made to the producer alone or to a trustee alone as a matter of mere administrative convenience. The ultimate beneficiaries are all persons whose cooperation is essential to the effectuation of the reduction program.

These contracts cannot be treated as mere adversary transactions. The Administration entered into them for the benefit of the public and primarily for the benefit of the parties themselves. Reduction of acreage has no value in itself but only as it benefits the public, and especially the farmers. The Secretary is authorized to enter into such contracts only as means for benefiting farmers. It is clear then that the persons for whose benefit the contract was entered into by the Secretary include those signing the consents as well as, if not more than, it does the producer. The subscribing producer may be an absentee landlord; the consenting parties may be share-tenants, share-croppers, demonstrators, laborers holding liens, any of whom are farmers in a more real sense than is the producer.

Moreover, the consenting parties are persons without whose cooperation the reduction program could not be realized. Now when the contracts were entered into it was likely that they would not wholly accomplish their purpose in a single year but would have to be renewed. If consenting parties were permitted to be defrauded by producers and put to their own initiative to obtain redress, it would be very much more difficult to gain their consent again. The Administration had an interest, therefore, to protect consenting parties and must have been bargaining for that protection.

Finally, that the Administration treated the consenting parties as privy to the adjustment contracts is shown by the various rules and regulations in which the Administration purported to bind consenting parties in a way which could probably not be done were they not privy to the contract. Thus, Tobacco Regulation 9 binds tobacco demonstrators who have signed tobacco contracts not to assist in the production of independent tobacco.

For these reasons, I conclude that any person so situated that his consent is essential to the reduction program and who signs the contract

as consenting party, is privy to the contract. Promises made by the producer to obtain his consent are part of the contract and enforceable under it (except for fraud, duress, and the like) by him and by the Secretary. (It is necessary to remember that the documentary forms do not constitute the contract but are merely partial evidence of it.)

V.

The considerations supporting this conclusion are fully applicable to tobacco demonstrators when the demonstrator's prior contract with the producer provides that a certain minimum acreage at least be used in tobacco production, and the adjustment contract calls for reduction below that minimum. If, in such a case, to obtain his consent the producer promises the demonstrator a share of the adjustment payment proportionate to his interest in the crop, that promise is an obligation under the contract enforceable by the demonstrator and by the Secretary.

On the other hand, if the demonstrator has no such prior right, his consent is not necessary; he is not privy to the adjustment contract; and any promises made to him by the producer to obtain his consent are independent transactions. Even if supported by a consideration, they do not create obligations enforceable under the adjustment contract. It would be improper for the Department to render an opinion or make a ruling purporting to control such a case.

VI.

In either case, the Administration should make payment in the manner described in paragraph 23 - that is, to the producer alone if there are no share-tenants or share-croppers, and if there are tenants or share-croppers, to the designated trustee. If payment is made to a trustee, the trustee should distribute the payment to the persons designating him, as their interests may appear. It is up to the producer, after he has received his money in one way or the other, to perform his obligations to the demonstrator. The demonstrator ordinarily has a right enforceable only against the producer and not against the Administration, the trustee or the other beneficiaries.

The situation is materially altered, however, where the demonstrator has not merely consented to the offer but has participated in the designation of the trustee.

It is now clear that paragraph 23 must be strictly limited in its effect to the mere description of the manner of payment in the first instance. Explicit provision is made for the situation where share-tenants and share-croppers participated in the production of the crop, not because it is intended to limit the class of beneficiaries, but only to protect the interests of such persons in view of the fact that they are usually unable to protect themselves. It is therefore proper to construe the phrase "designated as trustee * * * by the producer and * * * share-tenants and share-croppers" as not excluding the case where the trustee is designated by the producer, share-tenants and share-croppers, and in addition by other persons entitled to a portion of the payment. Thus,

where the consenting demonstrator is a privy to the contract, as explained above, and has also participated in the designation of the trustee, the trustee will be under a duty to distribute to him a part of the total payment in the proportion that the market value of his share in the tobacco produced on the farm in 1934 bears to the net market value of the total amount of the tobacco.

Particularly will the trustee be under such a duty where in the designation of trustee the demonstrator is called a share-cropper. For, even though the demonstrator is in fact not a share-cropper, an agreement between him and the producer that he is to be considered a share-cropper may be binding upon the producer as one of the promises made to secure the demonstrator's consent. It will be binding against the true share-tenants and share-croppers, since they are not adversely affected. It will be binding on the trustee, since the trustee receives the payment and must distribute it under the contract. It will probably be binding upon the Administration, since it is likely that the denomination was used on the advice of the county agent. The designation must be on a form prepared by the Secretary, and any interpretation of that form by the Secretary's agent, within the scope of his express or implied authority, will be binding upon the Secretary.

Where the demonstrator is not privy to the contract, his participation in the designation of the trustee may be ignored since he is not a share-cropper and has no right under the contract to be considered one. The trustee is not called upon to decide this question at his peril, since he is entitled to have it settled by a court in an action of interpleader.

VII.

Consider now the equalization payment. Paragraph 20 defines its amount. It is measured by the amount of tobacco of the 1933 crop sold before certain dates. Paragraph 20, also, states that the equalization payment is paid "for the benefit of the producer and such share-croppers and/or share-tenants as had an interest in such tobacco."

Paragraph 24 prescribes the manner of payment:

"(a) Each price-equalizing payment provided for by this contract shall be paid to the producer unless the tobacco produced on this farm in 1933 and sold through an auction warehouse market prior to and including October 28, 1933, was produced with the aid of share-tenants and/or share-croppers. (b) In the event that such tobacco was produced with the aid of share tenants and/or share croppers, each price-equalizing payment shall be paid to the producer if designated as trustee (or to such other person as may be designated as trustee) by the producer and such share tenants and share croppers on this farm as at the time of such sale had an interest in such tobacco. (c) Such designation shall be on forms to be approved by the Secretary. (d) Said trustee shall

distribute such payments to those so designating him as trustee, as their interests may appear, in the same proportion as the net market values of the respective shares of such persons in such tobacco bore to the net market value of the total amount of such tobacco." (Letters supplied).

VIII.

Paragraph 20 indicates that it was not intended to give an interest in the price equalization payment, as such, to any but the producer, share-tenants, and share-croppers. Therefore, the mere participation by the demonstrator in the designation of trustees, without more, would not entitle him, under the interpretation given the parallel provisions of paragraph 23, to any portion of the payment. The trustee must make distribution to the beneficiaries under the contract. As to this payment, the contract provides in terms that the beneficiaries are to be the producer, share-tenants, and share-croppers. (It will be remembered that there is no such explicit naming of beneficiaries in paragraph 19 or 23).

But, even though the demonstrator would not otherwise be entitled to any portion of the equalization payment, if in order to obtain his consent to the contract he was promised a portion of the equalization payment by the producer, that promise is part of the contract and enforceable under it. Particularly is this so if in the designation of trustee the demonstrator is termed a share-cropper. For an agreement that the demonstrator shall be treated as a share-cropper is binding under the contract against the producer, the true-share-tenants and share-croppers, the trustee, and probably also the Secretary.

IX.

If the tobacco demonstrator is not privy to the contract and does not participate in the equalization payment, his share of the crop cannot be used as the basis for the measurement of the equalization payment under the terms of Paragraph 20 of the contract. If checks have already gone out upon the total crop, the producer should be notified that except in those cases where the demonstrator is a party to the contract and entitled to a portion of the payment, that portion of the payment representing the demonstrator's share of the crop must be returned to the Administration.

SUMMARY

1. The tobacco demonstrator is not a share-cropper. He is a joint-venturer, and is co-tenant of the crop.

2. Where the tobacco production adjustment contract calls for reduction of acreage below the minimum guaranteed by the demonstrator's prior contract with the producer, the demonstrator's consent is essential to the effectuation of the purpose of the acreage reduction program. In that case, the demonstrator becomes one of the intended beneficiaries of the contract and whatever promises are made to him by the producer in exchange for his consent to the adjustment contract will be enforceable under the contract against the producer by the demonstrator and by the Secretary.

3. Where the demonstrator's prior right is not thus defeated by the adjustment contract, he has no valid claim arising out of the contract, even though he may have participated in the designation of the trustee under the contract and even though he may be designated as share-cropper or share-tenant.

4. The demonstrator may, nevertheless, have valid claims to a portion of the equalization payment arising under independent agreements with the producer. Such claims are controlled entirely by the local law and by the individual circumstances. It would not be proper to render an opinion or issue an Administrative Ruling controlling such claims.

5. The Administration should make payment in the manner described in Paragraphs 23 and 24. The trustee under these paragraphs should distribute the payment to the persons designating him, as their interests may appear. If the demonstrator is privy to the contract, his participation in the designation of trustee must be recognized. The trustee may protect himself by interpleader.

6. If the demonstrator is not privy to the contract and does not, therefore, participate in the equalization payment, the equalization payment must not be based upon his share of the 1933 crop.

Francis M. Shea,
Chief, Opinion Section,
Office of the General Counsel.

No. 121

AUTHORITY OF SECRETARY OF AGRICULTURE TO
DELEGATE POWERS IN THE ABSENCE OF EXPRESS
STATUTORY AUTHORITY

The Secretary cannot empower his agents to appoint subagents to perform the Secretary's duties and powers. If the particular duty to be performed, however, does not involve the exercise of discretion, but is ministerial only, the agent appointed by the Secretary may appoint subagents to perform such duties. Accordingly, agents of the Secretary may appoint auditors to examine books and records as provided in codes, marketing agreements, and licenses.

All powers and duties conferred upon or assumed by the Secretary of Agriculture in connection with licenses under the Agricultural Adjustment Act may be delegated and re-delegated, except the power to issue, suspend or revoke licenses, and the power to require licensees to furnish reports containing the information set out in Section 8(4) of the Agricultural Adjustment Act.

All powers and duties conferred upon or assumed by the President in connection with codes under the National Industrial Recovery Act may be delegated and re-delegated, except that the powers to approve, prescribe, cancel or modify codes may not be re-delegated. Likewise, all duties and powers assumed by the Secretary of Agriculture with respect to codes may be delegated and re-delegated, except that the Secretary does not have the power to delegate the approval, prescription, cancellation or modification of codes.

All powers and duties conferred upon or assumed by the Secretary of Agriculture in connection with marketing agreements under the Agricultural Adjustment Act may be delegated and re-delegated, except the power to enter into such marketing agreements.

Opinion Section Memorandum No. 189
Dated August 31, 1934.

August 31, 1934

MEMORANDUM TO MR. PRESSMAN

In answer to your request for an opinion, dated August 1, 1934, as supplemented by your memorandum to Mr. Heggy dated August 21, 1934, requesting that the opinion contain further information, I submit the following:

QUESTION

- (a) Pursuant to the power given to the Secretary in most of the codes, marketing agreements, and licenses, to appoint agents in the performance of any of the Secretary's duties and powers thereunder, can the Secretary give agents he so appoints the power to further appoint subagents to perform the Secretary's duties?
- (b) Under the powers as now worded, can the Secretary's agents appoint the auditors to examine the books and records of the members of an industry, or need such appointments be made directly by the Secretary?
- (c) Generally, what may be delegated or redelegated under the Agricultural Adjustment Act with respect to licenses and marketing agreements, and under the National Industrial Recovery Act with respect to codes?

OPINION

- (a) Without any express authorization in the power allowing him to do so, the Secretary cannot give the agents he appoints the power to further appoint subagents who will perform the Secretary's duties and powers. If the particular duty to be performed, however, is a matter not involving judgment or discretion, but is rather merely a ministerial, mechanical matter, then the agent appointed by the Secretary can appoint subagents to perform the duty.
- (b) The agents of the Secretary may make the appointments of the auditors to examine the books and records.
- (c) All powers and duties conferred upon or assumed by the Secretary of Agriculture in connection with licenses may be delegated and re-delegated, except the power to issue, suspend or revoke licenses, and the power to require licensees to furnish reports containing the information set out in Section 8 (4) of the Agricultural Adjustment Act.

All powers and duties conferred upon or assumed by the President in connection with codes may be delegated and re-

delegated, except that the powers to approve, prescribe, cancel or modify codes may not be re-delegated. Likewise, all duties and powers assumed by the Secretary of Agriculture with respect to codes may be delegated and re-delegated, except that the Secretary does not have the power to delegate the approval, prescription, cancellation or modification of codes. Furthermore, the Secretary of Agriculture has no powers at all with respect to hours, wages, or other conditions of employment.

All powers and duties conferred upon or assumed by the Secretary of Agriculture in connection with marketing agreements may be delegated and re-delegated, except the power to enter into such marketing agreements.

DISCUSSION

I.

The power given to the Secretary in most of the codes, marketing agreements, and licenses to appoint agents to perform any of the Secretary's duties and powers thereunder, does not impliedly give the Secretary the power to give the agents he so appoints the further power to appoint subagents to perform the Secretary's duties.

The question here involved is merely one of interpreting the particular clauses conferring the powers pursuant to which the Secretary may appoint agents.

The following is a usual type of power pursuant to which the Secretary is so empowered to appoint agents:

"The Secretary may delegate any person or persons to act as his agent or agents in the performance of any of the duties of the Secretary hereunder or the exercise of any of the powers of the Secretary hereunder."

This clause appears in the California Rice Marketing Agreement, the Connecticut Valley Tobacco License, the California Tokay Grapes Marketing Agreement and License, and elsewhere. Another closely similar form of the power to appoint agents is as follows:

"The Secretary may by a designation in writing name any person, including any officer or employee of the Government, to act as his agent in connection with any of the provisions of this agreement (or license)."

This clause appears in the Florida Citrus Fruit Marketing Agreement, the Peanut Millers Marketing Agreement and License, the California Ripe Olive Marketing Agreement and License, and elsewhere.

It seems clear that under a simple power to appoint agents, such as are these powers, the Secretary would not have the power to give the

appointed agent the right to name sub-agents. In the first place, there is no express power given to the Secretary by those clauses to so permit his agents to appoint subagents. And it is well settled that powers are strictly construed. Instruments conferring authority are construed to include only those powers which are expressly given. Duluth News Tribune v. Smith, 169 Minn. 356, 211 N.W. 322 (1926); Mechem, Agency, Second Ed., 1914, Sec. 784.

Further, the power to appoint subagents is strictly limited. An agent generally cannot employ a subagent unless he is expressly given the power to do so. Chouteau Land Co. v. Chrisman, 102 S.W. 973 (Mo. 1907); Warner v. Martin, 11 How. 208 (1850). The reason for the rule is clear. As the court stated in Hodkinson v. McNeal Machine Co., 161 Mo. App. 871, 142 S.W. 457 (1912):

"Generally speaking, the appointment of an agent does not authorize the agent to appoint a subagent unless that power is granted in the appointment. * * * The rule is that an agent in whom is reposed some trust or confidence in the performance of his agency, or who is required to exercise therein discretion or judgment, has no authority to intrust the performance of those duties to another, and thus bind the principal for the acts of the latter without the consent of the principal." (at S.W. pp. 458, 459)

While we are herein simply concerned with the problem of construing the power given to the Secretary, nevertheless the strict rules generally limiting the power of an agent to delegate his authority to subagents serve to aid in the interpretation of the power here involved. For if the power of an agent to appoint subagents is so strictly limited, and is generally held invalid unless expressly given, it also seems clear that an express power given to appoint agents would also be strictly construed, and not to impliedly include the power to give the agent so appointed further power to appoint a subagent. This is so because the reasons for the rule limiting the power of an agent to delegate his authority to subagents unless expressly authorized, apply with equal force to construing this power to simply appoint agents so as not to permit the empowering of such appointed agents to delegate their authority to subagents. An agent is not permitted to delegate his authority only because it is upon his judgment and discretion that the principal relies, and not upon anyone else to whom the agent might choose to delegate. Likewise, it would seem that when the power is given to the Secretary to name agents, it is upon the personal discretion and judgment of the Secretary alone in whom reliance is intended to be placed in the choice of persons who may perform his functions, and that such choice of agents was not intended to be placed in the judgment and discretion of anyone else. For it is undoubted, of course, that the mere selection of an agent involves discretion. See Mechem, Agency, supra, Sec. 305. As a principal would not necessarily wish to rely upon a subagent, so those charged with giving the Secretary the power to choose agents cannot be presumed to have consented to the choice being made ultimately by others than the Secretary, and it seems clear that the power must be so construed.

If one without express authority could empower an agent to appoint subagents, it would seem that with equal reason the subagent could also be empowered to so appoint other subagents with a similar power of delegation. Not only would there be no end to the power to delegate, but the entire purpose of investing the Secretary with the power to appoint agents would be defeated. It would therefore seem clear that the correct interpretation of these particular powers is that agents appointed to perform the Secretary's duties and powers set out in the various codes, marketing agreements, and licenses, can be appointed only by the Secretary, and not by anyone else. It therefore must be concluded that the Secretary, under the usual powers employed giving to him the power to appoint agents, is not thereby further impliedly empowered to give such agents the power to appoint subagents. To correct this situation, it is necessary to have the powers whereby the Secretary is given the right to appoint agents revised so as to expressly give him the power not only to appoint agents, but further to empower him to give such agents the right to delegate their authority to subagents.

It should be further noted, however, that the above conclusions concerning the use of subagents apply only to matters involving discretion and judgment. (See Op. Sec. Mem. 109 and 162) Under the power herein involved, the Secretary himself is specifically authorized to delegate "the performance of any of his duties", including, therefore, even matters involving the greatest judgment and discretion. But, as was before noted, his agents cannot do so, for the power of an agent to delegate his authority is strictly limited. And under the present form of the power, the agent cannot even be empowered to so delegate his authority. But it is a well-recognized exception to the rule forbidding an agent to delegate his authority to subagents, that a subagent may always be properly appointed by an agent to perform ministerial or mechanical duties not involving any discretion.

"Generally speaking, the appointment of an agent does not authorize the agent to appoint a subagent unless that power is granted in the appointment.

"There are certain well-recognized exceptions to the general rule, one of which is that the performance of purely ministerial acts which do not require the exercise of discretion or judgment and do not involve personal confidence and trust may be delegated by an agent without specific authority to do so being given by the principal." Hodkinson v. McNeal Mach. Co., 161 No. App. 871, 142 S.W. 457 (1912) at p. 458.

If, therefore, the particular activity involved is one which can be properly classified as ministerial rather than one involving discretion or judgment, the agent of the Secretary can properly delegate the task to a subagent, and no direct appointment by the Secretary to perform the duty need be made.

II.

The agents of the Secretary may make appointments of auditors to examine the books and records of the mem-

bers of an industry under licenses, marketing agreements, and codes.

It is understood that the specific problem which has given rise to the above general considerations is that of examining the books and records of the members of an industry for various purposes, such as to assist the Secretary in the furtherance of his duties with respect to the pertinent marketing agreement or license (California Rice Marketing Agreement; Peanut Millers Marketing Agreement and License), or for verification of information which the Secretary may require the parties to give (Burley Tobacco Marketing Agreement; Walnut Packers Marketing Agreement and License), or to enable the Secretary to ascertain and determine the extent to which the declared policy of the Act or the purposes of the code, marketing agreement or license are being effectuated (Southern Rice Milling Code; California Fresh Asparagus Marketing Agreement and License). Need the Secretary, therefore, directly name the examiners as his agents pursuant to the power given to him to appoint agents, or is it sufficient if an agent already designated by him appoints the examiners, thereby relieving him of this task?

There seems little question but that auditing books and records may often be a matter involving much judgment and discretion. One firm of auditors may conceivably produce entirely different results from another firm. For instance, there are undoubtedly different accounting principles which may in a certain situation produce different answers to the important question of whether a business is solvent or insolvent.

Yet, it also seems clear that what may be a matter of discretion in one situation may be simply a ministerial matter in another. For instance, in the case of Empire Gas & Fuel Co. v. Allen, 294 Fed. 617 (C.C.A. 5th, 1923), an agent had delegated the duty of determining whether a lease had been properly executed. The court intimated that such a determination would in many situations conceivably be a matter involving much discretion. But the particular business therein involved was one for the procuring of leases. And the court, in arriving at its conclusion that in such a case the task of determining whether a lease was properly executed was a ministerial one, took into consideration such elements as "the extent of its leasing business", "the nature of the respective duties" of the agent and the subagent, and "the need shown if the business was to be done efficiently, in view of" the agent's "frequent and continual absence" from the city, "to delegate the performance of such matters to a subagent." In the light of such considerations, the court concluded that "it is clear that such authority (to delegate to a subagent) should be implied". (at p. 620)

In the same way, auditing books may possibly be considered a matter of discretion in one case, and in another, merely the performance of a ministerial duty. And it seems clear that in this situation, the possible frequent examination of the books and records of all the members of an industry that would be necessary would be considered to be ministerial in nature. Employing the tests of the Empire Gas case, supra, the "extent" of the necessity for examining books in such situations as under the codes, marketing agreements, and licenses, is so great as to lead to the conclusion that it must be classed as a ministerial duty.

What is involved here is not the problem of determining such an important issue as the solvency or insolvency of some particular concern. Here, conducting examinations on a large scale is necessary, - examinations conducted in most cases to obtain purely factual and simple data. So that the "extent" of the activity herein involved, as in the Empire Gas case, supra, as well as the comparatively simple and mechanical form it takes, are important elements in arriving at the conclusion that in such a situation the task should be classed as ministerial rather than discretionary. Again, in the words of the Empire Gas case, "the nature of the respective duties" of the agent and subagent would be another important element in this determination. And it is the sharp differentiation in the nature of their duties with respect to the data that serves to emphasize the ministerial nature of the auditor's duties. The judgment or discretion involved in making any decisions based upon the data gathered by the auditors would be made by the agent to whom the Secretary is specifically authorized to delegate his discretion. "The nature" of his duty is to interpret the data and decide whether and how to act thereon. "The nature of the duty" of the subagent, however, in this particular set-up, is merely that of mechanically gathering the information.

In arriving at its conclusion, the court in the Empire Gas case, supra, was also motivated by the practical necessity of deciding as it did because of the "frequent and continual absence" from the city of the person upon whom it was sought to impose the task therein involved, and "the need shown if the business was to be done efficiently" of relieving the agent of the particular duty. Likewise, it would seem that the various duties of the Secretary would also make it necessary for him to be frequently in a locality different from that of the auditors, and this would make it necessary that the constant need for the appointment of the examiners be provided for uninterruptedly.

All the above considerations lead to the conclusion that in the situation with which we are here confronted, the examination of the books and records is a ministerial duty, and that the auditors may therefore be appointed by the Secretary's agent.

That there are contentions which may be offered in support of a contrary conclusion is admitted. The contention might be made that it is often made requisite that information so acquired from books and records be kept confidential, and that the task, involving as it does, therefore, personal trust, is a discretionary one. Personal trust and confidence is one of the important elements entering into the question of whether or not a duty is ministerial. Hodkinson v. McNeal Machine Co., 161 Mo. App. 871, 142 S.W. 457 (1912). It might also be argued with some force that the choice of different firms of auditors might be productive of results so different as to lead the Secretary or his agent to come to different conclusions with respect to such important decisions, for instance, as the level at which certain prices are to be fixed, or the proportionate amounts to be assessed against the individual members of the industry for contributions to certain funds. The discretion involved in the selection of a choice of one auditor may produce entirely different information upon which the Secretary can base his decision than would be the case if another auditor had been chosen. But in the

light of the comparatively simple nature of the data that would be required for the Secretary's purposes, it would seem that such a possibility is extremely remote. Such a contention, at any rate, merely amounts to saying that there could hardly be any ministerial duty whatsoever in the performance of which some discretion could not be displayed or personal trust and confidence involved. It is unquestioned, of course, that even ministerial acts can be better performed by one person than another. But this would hardly serve to change the fundamental nature of the act in the particular fact set up in which it appears.

Although the matter of examining the books and records in this case would thus seem to be a ministerial duty, so that the examiners need not be appointed directly by the Secretary as his agents, it would seem that the matter is not so entirely free of doubt that the form provision should not be changed if such is otherwise considered desirable. A change in the form provision in which the Secretary is given the right to name agents would leave no doubt in the future not only of the validity of the examiners' appointments by the Secretary's agents rather than by the Secretary himself, but also as to the authority of the agent to delegate any other duties or powers which under the present form he may now possibly be improperly delegating. Whether or not the Secretary's agent should delegate his discretion as a matter of policy is a different question from not being given the power to do so if such is considered desirable. Under the present form he does not even have the power, except for tasks falling within the category of "ministerial".

However, policy might, of course, dictate the desirability of not revising the form at all so as not to permit the agent to delegate discretionary duties and powers which have already been once delegated by the Secretary.

III.

General consideration of what powers with respect to licenses, codes, and marketing agreements may be delegated and redelegated, if authorized, under the Agricultural Adjustment Act and the National Industrial Recovery Act.

In addition to the question of interpretation of such delegation of authority clauses, the further consideration also arises, however, as to what power the Secretary has to so delegate, and permit redelegation of his powers, in marketing agreements, licenses, and codes, and therefore as to the effect of such delegation clauses in such instruments.

A. Licenses.

Under the Agricultural Adjustment Act the Secretary is given the power:

"to issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof." (Sec. 8 (3)).

These licenses can, according to the Act, contain any "term or condition" which

"may be necessary to eliminate unfair practices or charges that tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof." (Sec. 8 (3)).

The Secretary is thus invested with the power to issue licenses, and to include therein any clause which will have the effect of eliminating unfair practices, restoring normal economic conditions in the marketing of agricultural products, and effectuating the declared policy of the Act. These are broad terms. Under them the Secretary is not required to personally administer any of the duties in connection with the administration of a license. As there is, thus, no statutory requirement that the Secretary himself be intrusted with any duties whatsoever in connection with the administration of a license, and as the Secretary is broadly given the power to formulate the terms and conditions of a license, it is clear that the Secretary may assume duties himself and delegate them to the same person with whom he would originally have had the power to entrust the performance of those duties. Either would be consistent with the provisions of the statute. This is also true with reference to the Secretary empowering his agents to further delegate their duties to subagents, if such a mechanism is considered by the Secretary as necessary to eliminate unfair practices and to effect the purpose of the Act.

The conclusion that the Secretary may delegate and permit redelegation of all his duties or powers pertaining to the administration of licenses applies, except of course to those discretionary duties which the Act specifically imposes upon the Secretary alone and which, therefore, are not to be delegated away by him. It is clear that the power to issue licenses, entrusted to the Secretary under Section 8 (3) of the Act, is such a discretionary duty, invested by the Act in the Secretary alone, and therefore cannot be delegated away by him. In addition to this fundamental power to issue licenses, it seems that there are two other such non-delegable powers with reference to licenses with which the Act invests the Secretary alone. Section 8(3) provides:

"The Secretary of Agriculture may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof."

It seems clear, therefore, that the Secretary alone may suspend or revoke any license, for the Act specifically charges him with that duty, and the revocation of a license is undoubtedly a task involving the greatest discretion. Section 8 (4) of the Act also provides that the Secretary shall have the power:

"To require any licensee under this section to furnish such reports as to quantities of agricultural commodities or products thereof bought and sold and the prices thereof,

and as to trade practices and charges, and to keep such systems of accounts, as may be necessary for the purpose of part 2 of this title."

It also seems clear, therefore, that the decision, pursuant to the power given in this section of the Act "to require" a licensee to furnish such reports and to keep certain systems of accounts, is entrusted to the Secretary alone. The discretion, therefore, involved in making such decision is not to be delegated away. In this connection it should be pointed out that the non-delegable discretion involved in "requiring" licensees to furnish reports is not inconsistent with the conclusion heretofore arrived at that the Secretary's agent under a license may appoint the examiners necessary to audit the books after the Secretary has determined to "require" the licensees to furnish the reports specified by Section 8 (4) of the Act.

The powers, therefore, (1) to issue licenses, (2) to require licensees to furnish certain reports and to keep systems of accounts, and (3) to suspend or revoke any license, would seem to be the only one in connection with licenses which the Secretary may not delegate away. As to all other matters, - even those involving discretion - the Secretary may make a delegation, if to do so is "necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing and financing" of the agricultural product which is the subject of the license.

B. Codes.

The National Industrial Recovery Act contains no requirement as to what provisions, other than the few which the Act itself makes requisite, may be included in a code. It broadly states that the provisions of the code must "tend to effectuate the policy of this title". (Sec. 3a) It would, therefore, seem that under such a broad statutory authorization a delegation clause would certainly be justified, because, as was the case with licenses under the Agricultural Adjustment Act, there is no statutory requirement that anyone be given specific authority with reference to the administration of the various code powers. This conclusion would also justify the empowering of agents to delegate their authority to subagents, if to do so would "tend to effectuate the policy" of the Act.

Unlike the situation in the Agricultural Adjustment Act, in which it was concluded that there were certain powers in connection with the administration of licenses which were entrusted by the Act to the Secretary alone, and concerning which powers a delegation clause in a license could have no effect, the National Industrial Recovery Act specifically provides that:

"The President may delegate any of his functions and powers under this title to such officers, agents, and employees as he may designate or appoint, * * * to aid in carrying out his functions under this title." (Sec. 2b)

Therefore, all powers given to the President in connection with codes, - even that of approving or terminating (Sec. 3a) - may be delegated away by him pursuant to Section 2 (b) of the Act. While there can thus be no problem of delegation of any of the powers of the President in connection with codes, it was heretofore concluded, however, that a power to delegate to an agent does not imply a power to invest the agent with further power to delegate. We must, therefore, still look to the Act to discover which duties are entrusted to the President, which pursuant to Section 2 (b) he may delegate to an agent, but which the agent could not redelegate. We have concluded that generally a redelegation clause in a code would be valid. But with respect to duties specifically entrusted to the President by the Act, a redelegation clause would not be effective, because the President is merely given power to delegate such duties entrusted to him, and this does not impliedly include the power to give his agent power to redelegate.

The only functions with respect to codes that are so entrusted to the President - but which nevertheless may be delegated - are the approval or prescription of codes [Secs. 3 (a) and (d)] and their termination or modification (Sec. 10b). As to these duties, therefore, while the President may delegate his discretion away, pursuant to Section 2 (b) of the National Industrial Recovery Act, his agent could not make a redelegation of such discretion.

It will be recalled that the provision in the Agricultural Adjustment Act with reference to the requiring of reports is so worded as to cast upon the Secretary alone the duty of determining whether any licensee shall be required to so furnish information from his books and records. But the National Industrial Recovery Act provision as to books and records is more liberal. It was heretofore noted that the Agricultural Adjustment Act provision gives the Secretary the right "to require any licensee to furnish reports". It was therefore concluded that this right to so require, involving discretion, could not be delegated away by the Secretary. The National Industrial Recovery Act provision with reference to books and records, however, is as follows:

"The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest * * *" (Sec. 3a) (Underscoring supplied)

Thus, the President may broadly "impose conditions" with respect to the making of reports and the keeping of accounts. And these "conditions" which the President may "impose" may be such as to empower others to decide as to the necessity of any person subject to the code to furnish reports. The "conditions" which the President may "impose", therefore, with reference to calling for reports from the members of an industry may be such as to empower their agents to further delegate their discretion as to the calling for such reports. This power, granted in Section 3 (a), therefore, may not only be delegated away, pursuant to Section 2 (b) of the Act, but by the broad wording therein employed, may even be redelegated.

Specifically with respect to agricultural commodities, the Act authorizes the President to delegate any of his functions and powers to the Secretary of Agriculture (Sec. 8b). Any of the powers with respect to codes, therefore, which the Secretary of Agriculture can have, must be derived from the President by delegation. Pursuant to this Section, the President, by Executive Order dated June 26, 1933, did delegate to the Secretary of Agriculture all his functions and powers under the National Industrial Recovery Act with respect to agricultural commodities, with the exception of

"the determination and administration of provisions relating to hours of labor, rates of pay, and other conditions of employment",

and also reserved to himself the power to approve or disapprove of any code provision. As we have seen, however, the Secretary of Agriculture cannot delegate away his discretionary powers or duties with respect to code approval or prescription, and termination or modification, which were delegated to him by the President, because the Act only allows the delegation of these powers by the President, and not their redelegation by the President's agent. As to all other duties or powers that the Secretary may assume with respect to code administration, we have heretofore seen that there may be a clause permitting the redelegation thereof if to do so would "tend to effectuate the policy" of the Act.

C. Marketing Agreements.

There can be no question of the validity of the delegation and redelegation clause in a marketing agreement with respect to any of the Secretary's duties and powers thereunder if he is given any. If all the parties to the agreement consent to allow the Secretary to so delegate his discretion, with a further power in the Secretary's agent to delegate, there could be no possible objection to his so doing. There is nothing in Section 8 (2) of the Act, which empowers the Secretary to enter into marketing agreements, which in any way prohibits the use of such a clause.

The only power with respect to marketing agreements which the Secretary could not delegate away is that of entering into them. The Agricultural Adjustment Act specifically places this discretionary power in the hands of the Secretary alone. (Sec. 8 (2)).

Francis M. Shea,
Chief, Opinion Section,
Office of the General Counsel.

No. 122 .

LICENSING IMPORTERS FOR BENEFIT OF
DOMESTIC PRODUCERS

The Secretary of Agriculture is not authorized to issue licenses to importers of olive oil, under the terms of which the importers are required to pay an assessment for the benefit of domestic producers.

Opinion Section Memorandum No. 172
Dated September 4, 1934.

September 4, 1934

MEMORANDUM TO MR. FORTAS

You have requested my opinion as to the validity of a plan to license olive oil importers and under the terms of the license to compel them to pay an assessment for the benefit of domestic producers. I am of the opinion that the suggested plan is not authorized under the Agricultural Adjustment Act.

It may be doubted whether the proposed license would be constitutionally permissible, but I believe that issue may be avoided and the question answered strictly on grounds of statutory construction. The validity of the plan depends upon the existence of a power in the Secretary to control imports, not merely indirectly and incidentally, but directly. Such a power is not expressly given to the Secretary by any provision of the Agricultural Adjustment Act, and it is the opinion of this Section that no such power can be created by implication, in view of the explicitness with which Congress has dealt with the control of imports in the Tariff Act, in the National Industrial Recovery Act, and in the quota provisions of the Sugar Act. I express no opinion as to the validity of a scheme of regulation in which imports would be affected only incidentally and indirectly.

Francis M. Shea,
Chief, Opinion Section,
Office of the General Counsel.

No. 123

RECORDS TO BE FURNISHED UNDER SECTION 8
OF FEDERAL TRADE COMMISSION ACT

Cooperative associations are within the term "corporations" as defined in the Federal Trade Commission Act and data concerning them are therefore subject to the provisions of Section 8 of that Act.

Although Concurrent Resolution 32, 73rd Congress, in conjunction with the provision of the Emergency Appropriation Act, fiscal year 1935 (Public No. 412-73rd Cong.), which provides funds for carrying on the investigation authorized by the Concurrent Resolution, may be construed to extend the investigatory powers of the Federal Trade Commission to persons and partnerships, it does not extend the authority of the Commission under Section 8 of the Federal Trade Commission Act.

Section 10(h) of the Agricultural Adjustment Act does not extend the scope of Section 8 of the Federal Trade Commission Act to include information other than that relating to corporations.

Opinion Section Memorandum No. 174
Dated September 6, 1934.

September 6, 1934.

MEMORANDUM TO MR. FORTAS

Pursuant to your inquiry of August 23, I reply as follows:

Question I

Are cooperative associations of milk producers "corporations" under Section 8 of the Federal Trade Commission Act so that the Secretary may turn over confidential audits relating to them to the Commission at the request of the President?

Opinion

Cooperative associations are within the term "corporations" as defined in the Federal Trade Commission Act and data concerning them are therefore subject to the provisions of Section 8 of that Act.

Discussion

Section 8 of the Federal Trade Commission Act (Section 48, 15 U. S. C. A.) makes express provision for the furnishing of information by the several departments. It provides:

"That the several departments and bureaus of the Government when directed by the President shall furnish the Commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this Act, and shall detail from time to time such officials and employees to the Commission as he may direct."

It is clear from the terms of this Section that the ambit of the term "corporation" in it is to be determined by looking to its general use in the Federal Trade Commission Act. Section 4 of the Act defines "corporation" as follows:

"any company or association, incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members." (Sec. 4, 38 Stat. 719, Sec. 44, 15 U.S.C.A.) (Italics supplied).

The broad scope of the terms "any . . . association incorporated or unincorporated, without shares of capital or capital stock . . ." evidences an intention on the part of the legislature to include

within the statute cooperative associations of the type here under discussion. This, in fact, has been the practical interpretation of the Act by the Federal Trade Commission, and on ordinary rules of construction the practical interpretation of a statute is entitled to great weight in determining its significance. United States v. Vowell, 5 Cranch, 368 (1809); Edward's Lessee v. Darby, 12 Wheat. 206 (1827). The construction here advanced is, moreover, supported by the decision in 34 Op. Atty. Gen. 553 (1925), where, in passing on a Resolution directing the Commission to investigate open price associations, it was held that such cooperative associations are corporations under the Act. The Attorney General there said:

"Trade associations, or 'open price' associations, probably are corporations within the meaning of the Federal Trade Commission Act, or if not, are composed of corporations. Doubtless their operations, in many important particulars, affect interstate trade and commerce . . . The resolution calls for an investigation which ought to be of value to Congress in considering what legislation, if any, is required to cope with a new form of business organization which, while possessing valuable features, has presented many difficult problems, under the Federal anti-trust laws. I am aware that the discussion concerning trade associations has centered about their legality under the anti-trust acts, and that such associations have been the subject of four important decisions of the Supreme Court under those laws. I am of the opinion, therefore, that the investigation called for by Resolution Number 28 is appropriate to disclose the existence or nonexistence of alleged violations of the anti-trust acts by corporations as defined in the 4th Section of the Trade Commission Act and should be made". (P. 562-563)

It is accordingly concluded that confidential information concerning cooperative associations of milk producers is subject to Section 8 of the Federal Trade Commission Act.

Question II

Does H. Con. Res. 32, 73rd Cong., 2d Session, extend the provisions of Section 8 of the Federal Trade Commission Act to individuals and partnerships?

Opinion

Although the Concurrent Resolution in conjunction with the provision of the Emergency Appropriation Act, fiscal year 1935 (Public No. 412 - 73rd Cong.), which provides funds for carrying on the investigation authorized by the Concurrent Resolution, may be construed to extend the investigatory powers of the Federal Trade Commission to persons and partnerships, it does not extend the authority of the Commission under Section 8 of the Federal Trade Commission Act.

Discussion

Unlike a Joint Resolution approved by the President, a Concurrent Resolution is probably not to be given the dignity of a Statute and therefore is not an appropriate method of amending either by way of enlargement or limitation powers invested in a Government agency by a statutory provision. However, in the instant case, the Concurrent Resolution is implemented by an appropriation Statute, the Emergency Appropriation Act, fiscal year 1935, *supra*. This may be deemed a statutory confirmation of the Concurrent Resolution which invests with statutory force its essential provisions (See for a fuller discussion of these points Appendix "A"). It is clearly an essential provision of the Resolution that the Federal Trade Commission is empowered to investigate not merely corporations but also persons and partnerships, with reference both to possible anti-trust violations and also unfair competitive practices on the part of such persons or partnerships. In view of this, it must be considered that the Federal Trade Commission Act is so far amended as to permit investigation of persons and partnerships as well as corporations by the Federal Trade Commission for the purposes designated in the Concurrent Resolution.

However, this does not necessitate the conclusion that the Federal Trade Commission may also invoke the provisions of Section 8 of the Federal Trade Commission Act for the purpose of acquiring from other Government departments or agencies information with respect to such persons or partnerships. The portion of H. Con. Res. 32 pertinent to this issue reads as follows:

"That the Federal Trade Commission is authorized and directed to investigate conditions with respect to the sale and distribution of milk and other dairy products . . . by any person, partnership, association, cooperative, or corporation . . ." (*Italics supplied*)

From the above underlined language it is apparent that the intention of Congress in enacting this measure was to amend only those provisions of the Federal Trade Commission Act dealing with the independent investigatory powers of the Commission, namely Sections 6 and 9. The sole modification of the powers of the Commission resulting from the Resolution is that it may extend its inquiries to persons, partnerships, associations and cooperatives as well as to corporations. The ability of the Commission to secure information under Section 8 is not referred to in the Resolution; hence any alteration of its terms must be based on inference. However, no inconsistency can be found in the simultaneous application of expanded independent investigatory powers of the Commission under Sections 6 and 9 of the Act and Section 8 in its present limited form, which would suggest that Congress must have intended to modify the latter. Since, on established rules of construction with respect to the repeal of statutes by implication, it is settled that an earlier act remains in force unless the two are manifestly repugnant to each other, or unless in the later act express notice is taken of the former, plain-

ly indicating an intention to abrogate it, (Petri v. F. E. Creelman Lumber Co., 199 U. S. 487 (1905), Florida East Coast Railroad Co. v. Hazel, 43 Fla. 263, 31 So. 272 (1901)), it is believed that the provisions of Section 8 are unaffected by the modifications of the independent investigatory powers of the Commission.

The broader argument is proposed that the Concurrent Resolution may be read without reference to the Federal Trade Commission Act as delegating to the Federal Trade Commission the plenary powers of Congress which would authorize the Commission to demand from the Secretary information which has been acquired under the terms of licenses issued pursuant to the Agricultural Adjustment Act. This argument does not seem a feasible one. In making use of the Federal Trade Commission, the Congress called upon a body having a well defined organization and procedures of investigation. Any Act or Resolution calling upon these investigatory powers must be deemed in pari materia with the Federal Trade Commission Act and should not be deemed to depart from the dimensions of that Act except where there is explicit conflict. No such explicit conflict is indicated between the Concurrent Resolution and Section 8 of the Federal Trade Commission Act.

It follows that the Resolution does not authorize the Secretary to turn over to the Commission confidential information other than that relating to corporations.

Question III

Does Section 10(h) of the Agricultural Adjustment Act in conjunction with Section 8 of the Federal Trade Commission Act require the Secretary to turn over information secured in audits of licensees' books regardless of whether they are corporations or individuals?

Opinion

Section 10(h) does not extend the scope of Section 8 of the Act to include information other than that relating to corporations.

Discussion

The part of Section 10(h) of the Agricultural Adjustment Act relevant to the instant question reads as follows:

"For the efficient administration of the provisions of part 2 of this title, the provisions, including penalties of Sections 8, 9, and 10 of the Federal Trade Commission Act, approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this title and to any person subject to this title, whether or not a corporation" (*Italics supplied*)

It is suggested that the only duty of the Secretary of Agriculture to which Sections 8, 9 and 10 might be made applicable is that of furnishing the Commission, under Section 8 of the Federal Trade Commission Act, all records, papers and information in his possession useful to any investigation of the Commission. It is further contended that this duty of the Secretary by reason of the clause following relates to any person subject to the Title whether or not a corporation. It would be difficult to make a cogent analysis of Section 10(h) in these terms even were one at liberty to confine himself to a strictly verbal analysis. However, it is reasonably clear on the face of the Section, and the Legislative History gives explicit confirmation (Cong. Rec. Vol. 77, pp. 1481 et seq.), that what was intended was that the Secretary, in the exercise of his jurisdiction and powers and in performance of the duties imposed by Part 2 of the Agricultural Adjustment Act, was authorized to invoke the aid of the provisions of Sections 8, 9 and 10 of the Federal Trade Commission Act. If this be the meaning of Section 10(h), and that it seems difficult to controvert, then the analysis suggested is impossible.

Since no other basis can be found for the contention that the duties of the Secretary under Section 8 of the Federal Trade Commission Act are enlarged by Section 10(h) of the Agricultural Adjustment Act, it is concluded that the latter provision does not permit the Secretary to turn over to the Commission confidential information relative to individual producers of milk.

Francis M. Shea,
Chief, Opinion Section,
Office of General Counsel.

APPENDIX "A"

A concurrent resolution is an expression of the will of both Houses of Congress thus differing from a Senate or House Resolution. It differs also in certain material respects from a joint resolution. A joint resolution when passed by both Houses of Congress and approved by the President has all the effect of a statutory enactment. Sec. 7, Art. I, Constitution of United States. A concurrent resolution is not approved by the President. It stands independently as an expression of the purpose of Congress and being declaratory is not of the obligatory force of a statute. (1854) 6 Op. Atty. Gen. 680. It is an expression of the will of the legislature; but the conclusive test of its efficacy is whether it may repeal, modify or amend an existing act of Congress. The cases hold that it may not, although it may furnish indicia as to the purpose of the legislature in authorizing and directing an already legally enabled power. Aldridge v. Williams (1845) 44 U.S. 9 (3 Howard 9); State v. Brewster (1918), 171 Pac. 639; Comstock v. Davis (1919) 186 Pac. 380; Oklahoma News Co. v. Ryan (1924) 224 Pac. 969.

In Oklahoma News Co. v. Ryan, supra, the issue was raised whether a given resolution passed concurrently by the Oklahoma legislature was a joint resolution under the Oklahoma constitution or a concurrent resolution and hence not efficacious as a statutory enactment. It was conceded that a concurrent resolution operated merely as an expression of the Opinion of the Legislature and could not repeal, amend or supersede a regularly enacted statute of the state. But the court refused to be bound by terms (p. 971);

"It does not matter whether the resolution is termed a joint resolution or a concurrent resolution. If the resolution is passed by one house and is then sent to the other house for its concurrence and is passed by it and signed by the presiding officer of each house, and approved by the Governor, it becomes a law regardless of its designation, and is a joint resolution within the meaning of that term as used in the Constitution and the joint rules of the legislature."

In Congress a joint resolution is regarded as a bill. Olds v. Comm. of State Land Office, 134 Mich. 442, 86 N. W. 956 (1901). And a joint resolution of Congress is construed by the courts according to rules applicable to legislation generally. In Ann Arbor R. Co. v. United States, 281 U. S. 658 (1930), the Hoch-Smith Farm Resolution of Congress, Jan. 30, 1925, directing an Interstate Commerce Commission investigation was construed. The court said (at p. 666):

"The joint resolution is the outgrowth of several measures proposed in Congress but not adopted. Some of the measures may have been designed by their proposers to make real changes in existing laws relating to transportation rates. But they are not before us. The measure that is before us is the joint resolution which emerged from the legislative deliberations and proceedings. It is brought here to the end that we may determine its proper construction, which of course is to be done by applying to it the rules applicable to legislation in general.

"The question presented is whether the resolution changes the substantive provisions of existing laws relating to transportation rates, and particularly whether rates would be lawful under those laws are made unlawful by it."

But the concurrent resolution, being an expression of the will of Congress and being incapable of modifying, amending or changing the terms of prior legislation, must be read in conjunction with the Federal Trade Commission Act with which it is in pari materia in order to resolve ambiguity as to purpose. That the Concurrent Resolution, although not of the force of a joint resolution, nevertheless, takes on statutory significance to the extent that the courts will read the

resolution and the Act together, appears when the course of legislation with reference to the milk dairy investigation is followed.

The "Emergency Appropriation Act, fiscal year 1935" (Public - No. 412 - 73d Congress) provides:

"For an additional amount for the Federal Trade Commission, including the same objects specified under this caption in section 1, title I, Independent Offices Appropriation Act, 1935, to enable the Commission to comply with the provisions of H. Con. Res. 32 of the Seventy-third Congress, Fiscal year 1935, \$30,000."

The "Emergency Appropriation Act, fiscal year 1935" is a statutory confirmation of Concurrent Resolution #32. Statutory confirmation after a resolution has been adopted is as effective as statutory authority in advance of its adoption. People v. Hofstadter, 258 N.Y. 425, 180 N.E. 107 (1932).

In the Hofstadter Case, supra, a resolution of the legislature of the State of New York, passed concurrently by the Senate and Assembly defined an investigating committee's essential organization and period of existence. Later (a month) there was appropriated in aid of the inquiry a sum of money for the use of the committee appointed pursuant to the resolution. It was held that the resolution was ratified and confirmed by the statute appropriating money and the terms thereof. Chief Justice Cardozo said (at p. 109):

"Here is an unmistakable recognition of the organization of the committee as established by the concurrent resolution and an unmistakable confirmation of its continuing validity. Mere incidents and details, not essential to the life of the investigating body, capacities, and functions capable of being divested without destroying its existence, will not be held to have been confirmed by the appropriation of a sum of money, nor even, it may be, by the later grant of added powers. On the other hand, those terms of the resolution that define the essential organization of the investigatory body, its birth and life and death, must be deemed to have been ratified by acts of recognition so explicit and persuasive."

The intention of Congress was, therefore, to confirm the purposes of the investigation as the concurrent resolution had stated them. This confirmation was by statute and hence the Concurrent Resolution must, to the extent of expressing the purposes of Congress, be given the effect of a statute and read together with the Federal Trade Commission Act, to determine their mutual effect.

Francis M. Shea,
Chief, Opinion Section,
Office of the General Counsel.

No. 124

NECESSITY FOR BIDS IN PURCHASE OF
CATTLE FOR RELIEF PURPOSES

The Bureau of Indian Affairs, in purchasing cattle with funds which have been given to it by the Secretary of Agriculture for the purchase of cattle for distribution for relief purposes, need neither advertise for bids nor enter into written contracts, but may make such purchases in the open market.

Opinion Section Memorandum No. 175
Dated September 7, 1934.

September 7, 1934.

MEMORANDUM TO MR. WARD M. BUCKLES, DIRECTOR OF FINANCE

In reply to your oral request, I am submitting herewith the following opinion:

QUESTION

May the Bureau of Indian Affairs to which funds have been given by the Secretary of Agriculture for the purchase of cattle for distribution for relief purposes make such purchases in the open market?

OPINION

The Bureau of Indian Affairs need neither advertise for bids nor enter into written contracts for the purchase of cattle for distribution for relief but may make such purchases in the open market.

DISCUSSION

Section 2 of the Jones-Connally Cattle Act (Pub. No. 142-73d Cong.) provides:

"To enable the Secretary of Agriculture to finance, under such terms and conditions as he may prescribe, surplus reductions and production adjustments with respect to the dairy- and beef-cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the markets for the dairy and beef cattle industries, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$200,000,000: Provided, That not more than 60 per centum of such amount shall be used for either of such industries."

The Emergency Appropriation Act, Fiscal year 1935, appropriated the sum of \$525,000,000 "to meet the emergency and necessity for relief in stricken agricultural areas." It is provided that this sum is "to be allocated by the President to supplement the appropriations heretofore made for emergency purposes" and for other purposes designated therein.

The President, pursuant to the authority vested in him by the Emergency Appropriation Act, Fiscal year 1935, and by Executive Order No. 6747, dated June 23, 1934, allocated "to the Secretary of Agriculture or such agency as he may designate the sum of \$43,750,000 for the purchase, sale, gift, or other disposition of seed, feed, and livestock, and for transportation thereof."

1. The purchase of cattle for distribution for relief is authorized by section 2 of the Jones-Connally Cattle Act and by paragraph 2 of Title II of the Emergency Appropriation Act, Fiscal year 1935.

Although neither by the Jones-Connally Cattle Act nor the Emergency Appropriation Act, Fiscal year 1935, is there an express authorization for the purchase of cattle for distribution for relief, it is submitted, nevertheless, that such purchases may be made. The position has already been taken that "Funds appropriated under sections 2 and 6 of the Jones-Connally Cattle Act (Pub. No. 142 - 73d Congress) and advanced to the Federal Surplus Relief Corporation by the Secretary of Agriculture for the purchase of dairy products may be legally expended by the corporation for such processing as is necessarily entailed in preparing such products for relief distribution," (Op. Sec. Mem. No. 164) though section 2 of the Act does not expressly authorize such processing. The argument in support of this view appears in the following language taken from that opinion:

"Funds are made available under section 2 for, among other purposes, 'surplus reductions'. The purchase of butter or cheese is therefore authorized where such purchase is made in order to reduce a surplus of these commodities. And authority to make such purchases carries with it as a necessary incident the power to make such disposition of the surplus commodities purchased as will conduce to or, at least, be not inconsistent with, the purpose of the purchase. Distribution of the commodities for relief purposes clearly fulfills these requirements, since there is very little chance, if the surplus commodities are distributed in small units adapted for individual consumption that they will be marketed by the distributees and again help to create a surplus."

By the same process of reasoning the purchase of cattle and their distribution for relief would seem to be authorized under section 2. Section 2 authorizes the purchase of cattle to enable a reduction in the surplus of dairy- and beef-cattle and to support and balance the market for these industries. As incidental thereto and to effectuate the purpose of the purchase, the cattle may be distributed for relief purposes. Therefore it follows that the purchase of cattle for distribution for relief may be made out of funds appropriated by paragraph 2 of Title II of the Emergency Appropriation Act, Fiscal year 1935, which appropriates \$525,000,000 to supplement the appropriations heretofore made for emergency purposes.

This also seems to be the view of the Comptroller-General as expressed in his decision of August 6, 1934 (A-56438). The question involved was whether the purchase of sheep and/or goats could be paid for from funds appropriated by paragraph 2 of Title II of the Emergency Appropriation Act, Fiscal year 1935, and the allotment of funds by Executive Order No. 6747. In a letter to the Secretary of Agriculture, dated July 31, 1934, the Comptroller-General, withholding his approval of the "draft of form of Public Voucher and Emergency Livestock Agreement," submitted, expressed his doubt that such purchases were authorized under the Act. Although Executive Order No. 6747 allocated part of the funds appropriated "for the purchase, sale, gift, or other disposition of seed, feed, and livestock" (*italics supplied*) the Act does not mention the word "livestock." Thereafter, however, following the receipt of a reply from the Secretary the Comptroller approved the form saying:

"It is to be observed that upon consideration of the administrative recommendations as outlined by you the Congress employed language in appropriating the moneys requested strongly suggesting a purpose that the livestock in the stricken areas be saved thereto through providing feed therefor and seed to make possible future crops, rather than a purpose that existing herds be depleted through purchase and slaughter or other disposition, and while the appropriating language employed in paragraph 2 of title II of the 'Emergency Appropriation Act, Fiscal Year 1935' provides for the exercise of discretion in the matter of selection as between the purposes therein enumerated and those included by the provision 'to supplement the appropriations heretofore made for emergency purposes', such discretion does not extend, of course, to the adding of new purposes. However, in view of the history of the legislation and a possible legislative purpose to sanction 'livestock' purchases, you are advised that if it be concluded by you that purchase of sheep and goats, in addition to cattle, is necessary to relieve emergency conditions in the drought stricken areas, this office will withhold objection to otherwise proper payments therefor."

Consequently, it would seem that purchases of cattle for distribution for relief may be made out of funds appropriated by paragraph 2 of Title II of the Emergency Appropriation Act. (See also Op. Sec. Mem. No. 143, Question 3).

2. The funds appropriated by paragraph 2 of Title II of the Emergency Appropriation Act, Fiscal year 1935, may be given by the Secretary of Agriculture to the Bureau of Indian Affairs and by it expended for the purposes therein permitted.

The Emergency Appropriation Act, Fiscal year 1935, provides:

"To meet the emergency and necessity for relief in stricken agricultural areas, to remain available until June 30, 1935, \$525,000,000, to be allocated by the President to supplement the appropriations heretofore made for emergency purposes * * *; expenditures hereunder and the manner in which they shall be incurred, allowed, and paid, shall be determined by the President, * * * and may be made without regard to the provisions of section 3709 of the Revised Statutes."

Executive Order No. 6747 provides:

"By virtue of, and pursuant to, the authority vested in me by the Emergency Appropriation Act, Fiscal year 1935, appropriating \$525,000,000 to meet the emergency and necessity for relief in stricken agricultural areas, there is hereby allocated . . .; and to the Secretary of Agriculture or such agency as he may designate the sum of \$43,750,000 for the purchase, sale, gift, or other disposition of seed, feed, and livestock, and for transportation thereof."

The Bureau of Indian Affairs is included within the term "such agency as he may designate" within the meaning of Executive Order No. 6747.

3. The Bureau of Indian Affairs may make open market purchases of cattle for distribution for relief.

The manner in which Government purchases are ordinarily made is provided for in section 3709 of the Revised Statutes which reads:

"Advertisements for proposals for purchases and contracts for supplies or services for departments of Government. --- Except as otherwise provided by law all purchases and contracts for supplies or services in any of the departments of the Government and purchases of Indian supplies, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals. (Title 41, Section 5, U.S.C.A.)

However, it is provided by Par. 2 of Title II of the Emergency Appropriation Act, Fiscal Year 1935, that:

"Expenditures hereunder and the manner in which they shall be incurred, allowed, and paid, shall be determined by the President, * * * and may be made without regard to the provisions of Section 3709 of the Revised Statutes."

Executive Order No. 6747 does not contain any direction as to the manner in which expenditures shall be incurred or paid. It seems to follow, therefore, that the Bureau of Indian Affairs may make purchases in the open market. (See Op. Sec. Mem. No. 117)

Francis M. Shea,
Chief, Opinion Section,
Office of the General Counsel.

No. 125

BANKHEAD ACT - TAX EXEMPTION
CERTIFICATES

Tax exemption certificates issued in 1935 under the Bankhead Act may be used for the purpose of exempting from next year's tax cotton harvested during the present year.

Opinion Section Memorandum No. 176
Dated September 8, 1934.

September 8, 1934.

MEMORANDUM TO MR. McCONNAUGHEY

Pursuant to your request for an opinion, dated August 31, 1934, presenting the following

Question

Can exemption certificates issued next year be used to clear cotton that is held over from this year?

Opinion

It is my opinion that next year's exemption certificates may be used for the purpose of exempting from next year's tax cotton harvested during the present year.

Discussion

Section 4 (e) (2), standing alone, would be subject to the interpretation that the exemption from the tax extended only to cotton harvested in the crop year in question from each farm to which an allotment was given and to the extent only of such allotment. However, Section 9 (d), which permits the transfer of certificates of exemption, clearly indicates that the cotton to be exempt need be identified with no particular farm nor particular allotment. It would seem a compelling implication from this that while the Congress intended to afford each cotton producer the means of marketing his fair share of the total amount which could be marketed without destroying the balance between production and consumption, nevertheless, having afforded that opportunity, Congress was concerned as the measure of control solely with the amount of cotton marketed during a crop year. In short, it does not afford the machinery for, and therefore must be deemed not to have been concerned with, identifying the cotton marketed under exemption certificates with any particular farm or any particular period of production. Though there is no explicit statement to this effect in the Act, its terms are consonant with such an interpretation particularly Section 10(a) reading:

"Upon the payment of the tax on any cotton, or the surrender of exemption certificates covering cotton, the collector receiving such payment or certificates shall deliver to the person so paying or surrendering an appropriate number of bale tags which shall be affixed to such cotton."

Moreover, this interpretation is fully buttressed by Congressional debate (See Vol. 78, Cong. Rec. pp. 4302, 4530, and 4553). It seems

to me also that the statement of the Managers on the part of the House as to Amendment No. 7 accompanying the Conference Report (H. Rep. No. 1239 - 73rd Cong.) sustains this interpretation. To be sure, the rejection of the Amendment to which this refers, which explicitly covered the issue here presented, might normally be construed as indicating the intention of Congress that the retained wording is not to be interpreted as permitting what was authorized by the rejected wording. However, as the retained wording contained wider provisions than the rejected wording, and as the House Managers specifically stated that in restoring the House provision the conferees were "retaining the substance of the matter proposed to be inserted by the Senate Amendment which is covered in the language restored and in other provisions of the Bill", it would seem reasonably clear that the Congress intended the interpretation given in the foregoing opinion.

Francis M. Shea,
Chief, Opinion Section,
Office of the General Counsel.

TERMINATION OF ARTICLE VIII OF MARKETING
AGREEMENT FOR SOUTHERN RICE INDUSTRY

If Article VIII of the amended Marketing Agreement for the Southern Rice Industry is suspended until July 1, 1935, cooperating producers, as third party beneficiaries who have acted in reliance upon the Agreement, may have a technical cause of action against the Secretary, but since substantial damage can probably not be shown, the possibility of litigation is not formidable; the question of good faith in carrying out official statements made to producers is one for consideration as a matter of administrative policy.

As to the 40% payments already made to the Secretary on account of rice purchased, cooperating producers have an interest as beneficiaries of a fixed trust, and distribution should be made, according to Article VIII, Section 3.

As to the advances made to the Secretary, these should be repaid as provided by the Agreement. A proposal for the relinquishment of the millers' claims to repayment may involve legal, as well as administrative, difficulties of a serious nature.

The legal difficulties involved in carrying out Article VIII appear to involve chiefly the difficulty of enforcing the 40% payments from the millers. The obligations of the millers to make such payments to the Secretary are not dependent on the non-assertion of claims by lienholders.

September 8, 1934

MEMORANDUM TO MR. MILLER, CHIEF OF RICE SECTION

I submit herewith my opinion upon questions raised in your memorandum of September 6, 1934, regarding the proposed suspension of the crop-control features of the Marketing Agreement for the Southern Rice Milling Industry. It should be understood that, in view of the broad terms in which the problem is presented, it has not been possible to prepare an exhaustive statement, and this opinion should therefore be regarded as in the nature of a preliminary examination only.

QUESTIONS

I.

If Article VIII of the amended Marketing Agreement for the Southern Rice Industry is suspended until July 1, 1935, what legal difficulties may ensue?

II.

In general, if Article VIII is continued in effect, what legal difficulties may be anticipated in its execution?

OPINION

(1) If Article VIII is suspended cooperating producers, as third party beneficiaries, who have acted in reliance upon the Agreement, may have a technical cause of action against the Secretary. Since, however, the price they will receive in the event of suspension will be as much as, or more than, they would be entitled to receive if the Article were continued, substantial damage can probably not be shown; the possibility of litigation is accordingly not formidable. The fact that producers may have been misled to their damage by reducing their crops, in reliance upon official statements to the effect that only by so doing would they be entitled to receive the full price, does not furnish ground for an action against the United States since it has not consented to be sued in tort. The question of good faith is therefore one for consideration as a matter of administrative policy.

(2) As to the 40% payments already made to the Secretary on account of rice purchased, cooperating producers have an interest as beneficiaries of a fixed trust, and distribution should be made, according to Article VIII, Section 3.

(3) As to the advances made to the Secretary, these should be repaid as provided by the Agreement. A proposal for the relinquishment of the millers' claims to repayment may involve legal, as well as administrative, difficulties of a serious nature.

II.

The legal difficulties involved in carrying out Article VIII appear to involve chiefly the difficulty of enforcing the 40% payments from the millers. The obligations of the millers to make such payments to the Secretary are not dependent on the non-assertion of claims by lienholders.

STATEMENT OF FACTS

Article VIII of the Agreement provides that the Secretary "shall institute an annual crop control program."

Section 1, Article VIII, which provides for the setting up of a trust fund, reads in part as follows:

"To provide funds to be paid to producers who cooperate in any such crop control program, the contracting millers agree to establish a trust fund in the following manner:

(a) Commencing July 1, 1934, each contracting miller, upon making payment for any rough rice (of the crop of 1934 or any later year) purchased, shall make (1) a payment to the owner thereof, and (2) a payment to the Secretary. Anything hereinabove to the contrary notwithstanding the amounts of these payments shall be such that the payment to the owner equals sixty (60) percent, and the payment to the Secretary forty (40) percent, of the sum of the two payments, but in no event shall such sum be less than the minimum price payable pursuant to article III and Schedule 1 hereof. * * *

Section 3 provides that each producer who limits the acreage planted to the allotment assigned to him

"shall receive from the trust fund by the end of the crop year, payments aggregating a sum not exceeding the total sum paid to the Secretary during said crop year, pursuant to section 1 of this article, on rough rice purchased from said producer within his production quota, less his proportionate share of the expenses incurred pursuant to this article which shall be paid by the Secretary out of the trust fund."

Pursuant to further provisions of Article VIII, community, county and State committees were formed and producers, representing a high percentage of the total number, responded to the invitation extended to file applications for rice acreage allotment and were thereupon assigned allotments, which were approved by the Rice Section. The distribution of adjustment contracts has been delayed, but forms entitled "Statement of Intentions-to-Plant", drawn in the form of a contract between the producer and the Secretary have now been issued. This contract calls for the signature of the producer, also for the signing of a consent by lienholders, and for the signatures of members of the community and State committees certifying that the intended acreage is not greater than the allotment assigned to the producer. No blank is provided for the signature of the Secretary but Part 2 of the contract entitled "Performance by Secretary" is to the effect that "the Secretary by accepting this statement, agrees to make adjustment payments to the producer" according to the provisions of Article VIII of the marketing agreement. Although some of these Statements have now been signed by producers and some by lienholders, none has been officially accepted by or filed with the Secretary. Notwithstanding this delay in the concluding of direct contractual arrangements with the Secretary, a high percentage of the producers have reduced their acreage in accordance with their allotments.

The Control Committee has advanced to the Secretary, in accordance with section 6 of Article VIII, funds necessary for the initial expenses of instituting the control program. Checks and drafts totalling about \$50,000 have been sent in by millers in payment of the required 40% on account of rice purchased since July 1.

If Article VIII is suspended, it is understood that it shall be on such terms that the full price set pursuant to Article III will be paid to both non-cooperating and cooperating producers.

DISCUSSION

I. Problems Involved in Suspension of Article VIII.

This problem presents three distinct aspects, as follows:

- (1) the rights of cooperating producers, as to payments upon rice not yet marketed;

- (2) the rights of cooperating producers as to the 40% payments already made on account of rice already marketed;
- (3) the rights of millers and the Control Board, as to funds advanced to the Secretary for meeting the expense of initiating the control program.

(1) As to payments upon rice not yet marketed.

A preliminary question is whether the exercise of a right of amendment under Article XXII of the Agreement can have the effect of cutting off rights based upon acts done prior thereto. This Article reads as follows:

"Any amendment to this Agreement shall become effective at the date designated by the Secretary upon approval of such amendment by the Secretary, provided that such amendment shall have first been approved by Millers who milled or exported more than one-half of the total rough rice milled and exported during the last three preceding crop years."

No reservation is made as to the scope of this power of amendment and any limitations which exist must rest upon implication only. It is the general rule that when an agreement is made for the benefit of third parties, and such parties have acted in reliance thereon, the contracting parties may not thereafter modify or terminate the agreement so as to cut off the rights of the beneficiaries. However, such rights as the beneficiaries acquire must be limited to the terms of the contract, and in relying upon its provisions they must be presumed to have assented to all its terms, in this case including the provisions for amendment and termination. Article XVIII, relating to the effect of termination of the Agreement, provides that

"The benefits, privileges, and immunities conferred by virtue of this Agreement shall cease upon its termination, except with respect to acts done prior thereto;"

The problem of the effect of such a clause, considered in conjunction with a power of amendment, was considered with reference to the Marketing Agreement for the California Rice Industry, and it was our opinion (Op. Sec. Mem. No. 90) that neither termination nor amendment could safely be relied upon to cut off the rights of cooperating producers. It is true that the provision for amendment in that Agreement differed somewhat from that in the present Agreement, but not to such an extent as to compel a different conclusion.

A second preliminary question is whether the conditions precedent to the acquisition of rights under Article VIII have been satisfied. It is clear that the conclusion of a formal contract between the producer and the Secretary is not required. Section 3 provides for trust fund payments to

"Each producer who limits the acreage planted by him in said year to the allotment so assigned to him, such limitation to be confirmed by the Secretary as he may determine,"

Since allotments have been assigned and since producers have limited their acreage accordingly, it appears that the conditions precedent to the right to payments have been satisfied, provided proof of performance can be made as required.

The nature and value of the right acquired by the producers may now be considered, particularly with reference to the opinion previously given with respect to proposed changes in Marketing Agreement for the California Rice Industry (Op. Sec. Mem. No. 90). It was the conclusion of that opinion that, if the Marketing Agreement were terminated or if the article providing for a crop control program were eliminated by amendment, the cooperating producers, as third party beneficiaries, would have a cause of action upon the Agreement for damages suffered. The control plan in California is similar to that provided for in the present Agreement in that it calls for a trust fund, to consist of payments made by the millers for that purpose at the time of the purchase of rice from the producers. Under that plan, however, the entire amount of the trust fund, except for deductions for administrative expense, is to be distributed to the cooperating producers. Hence, any payments made to the trust fund on account of rice purchased from non-cooperating producers will augment the ultimate return to producers cooperating in the program. Conversely, the termination of the control plan, in the event that the payments which would otherwise be payable on account of rice purchased from non-cooperating producers should exceed the amount of administrative expenses, would injure the cooperating producers by depriving them of this enhanced return.

In contrast to this, the cooperating producer under the Southern Rice Marketing Agreement is to receive from the trust fund

"A sum not exceeding the total sum paid to the Secretary . . . on rough rice purchased from said producer within his production quota"

less his proportionate share of the administrative expense. Article VIII, Section 3. Thus no part of the payments made to the Secretary on account of rice purchased from producers not joining in the control program may be used to augment the trust fund payments to cooperating producers, at least before the end of the crop year. As to the disposition of such payments the Agreement provides only that

"Any moneys remaining in the trust fund at the end of any crop year, after all proper payments to producers have been made and all expenses paid, shall be used and/or distributed as the Secretary shall determine to effectuate the purpose of the Act."

It is clear that cooperating producers have no enforceable legal interest in these remaining moneys.

It follows that, if Article VIII is suspended, and the entire price fixed pursuant to Article III of the Agreement is paid direct to cooperating and non-cooperating producers alike, those who have reduced acreage will receive all that they would be entitled to receive if the trust fund plan were carried out in its entirety. In fact they will receive more, as the price paid by the millers will be subject to no deduction for administrative expenses. Non-cooperating producers, on the other hand, will benefit from the elimination of the trust fund plan since they will receive 100% of the Secretary's price, instead of the 60% to which they would be entitled under Article VIII. The trust fund feature, in other words, if carried out, will not operate as a bonus to cooperating producers, as does the California Agreement, but as a penalty upon those who fail to cooperate.

The question may well arise, therefore, whether the trust fund plan may properly be regarded as an agreement for the benefit of third parties in the legal sense. It is my opinion that it may be so regarded. Sufficient "benefit" in legal contemplation may probably be found in: (1) the special mode of payment which Article VIII provides, or (2) in the avoidance of the detriment represented by the Agreement to withhold 40% of the Secretary's price, or (3) in the enhanced competitive position which the cooperating producer may expect to enjoy as against the non-cooperating producer. Whether the cutting off of such benefits by suspension of Article VIII, and the substitution of direct payments of 100%, would cause any actual damage to growers participating in the control program is another question. As to the first two of the three forms of benefit suggested above, it is clear that it would not. The factor of relative competitive advantage, while possibly more substantial, must in any case be almost incapable of measurement sufficiently precise for an award of damages.

It thus appears that although cooperating producers may have a technical cause of action in the event of the termination of the trust fund plan, any claim they may have (in case they are paid 100% of the Secretary's price upon all rice thereafter marketed by them) will be limited to nominal damages. The probability of suits against the Secretary, based upon the Agreement, does not, therefore, appear formidable. It cannot be said, however, that the cooperating producer will suffer no injury. Even though paid the entire price upon all his rice marketed, he stands to receive a decreased total return because of his reduction of acreage. The reduction of acreage, therefore, and not the incidental fact that, if Article VIII goes out, the non-cooperating producer will suffer no similar loss, is the cause of loss to the cooperating grower.

In this situation the question of good faith in the methods used to induce reduction of acreage cannot escape attention. In "selling" the control program to growers, it is understood that the penalty attendant upon non-participation under the trust fund plan has been emphasized. It is stated in the first paragraph of the "Instructions" (Form Rice 16). issued by the Department as a guide to producers for filing Statements of Intention-to-Plant, that

"the only way that a producer can receive the price established by the Secretary for his product is to cooperate in the program."

The Marketing Agreement is mentioned in these Instructions as the basis of the crop control program but it is doubtful, in view of such statements as that quoted, whether the relation of the producer's rights to the Agreement is adequately disclosed. In the "Questions and Answers Covering the 1934 Rice Production Control Program" (Form Rice 12) the Marketing Agreement is not even mentioned. In this publication it is stated categorically that "every producer shall receive the producer's price at the time of the sale of rough rice," the difference between that price and the price set by the Secretary to be paid from the Trust Fund to participating producers. Questions 34 and 35. No reference is made to the fact that millers not parties to the Agreement are controlled by a license, and that they must pay producers the entire price set by the Secretary without deduction.

It is true that the methods employed by agents of the United States, acting within the scope of their authority to induce acreage reduction, although possibly involving misrepresentation or non-disclosure of material facts and resulting in damage to producers acting in reliance thereon, cannot form the basis of an action against the United States, for the reason that such an action would sound in tort and the United States has not consented to be sued in tort actions. Remedies available to the producers against the United States or its agents would therefore appear to be limited to an action on the Marketing Agreement, and, as has been seen, the difficulty of proving damage because of failure to continue Article VIII militates against the likelihood of suit. Since consent to the requested amendment is within the discretion of the Secretary, however, it is deemed appropriate to point out that, although the bringing of tort actions against the sovereign is legally barred, the question of good faith and the question of damage suffered by producers relying upon official statements and responding to official appeals for their cooperation are none the less open for consideration as matters of administrative policy.

(2) Payments already made, or payable, on account of rice purchased

If Article VIII is amended, the amendment will become effective upon the date designated by the Secretary. Unless otherwise specified in the amendment, the obligation of millers to make the 40% payment to the Secretary on account of rice purchased prior to such date will not be effected. Payments made to the Secretary pursuant to the terms of Article VIII, section 1, are impressed with the character of a trust, or series of trusts, in which each cooperating producer has a beneficial interest to the extent of the amount paid on account of rice purchased from him. This interest, being fixed and vested cannot be cut off by the suspension of Article VIII, and payments should accordingly be made to cooperating producer in accordance with the terms of Section 3.

Non-cooperating producers have no such interest in the 40% payments made to the Secretary on account of rice purchased from them, and the fund

so created may be expended as provided in Section 6 relating to surplus trust funds.

3. Advances made by the Control Committee for administrative expenses

In accordance with the provisions of Article VIII the Control Committee advanced a substantial sum to the Secretary for the purpose of meeting the initial expenses of the control program. This advance was made from the Marketing Fund created from "marketing assessments" of five cents per barrel payable by contracting millers on all rice milled by them. Opinion has already been given (Op. Sec. Mem. 144, July 25, 1934) to the effect that the Secretary is obligated to repay this advance, notwithstanding possible termination of the Agreement. The same conclusion will undoubtedly apply if Article VIII is eliminated by amendment.

It is understood that millers who are parties to the Agreement have proposed, in the event that Article VIII is terminated or suspended, to waive any claim they may have in respect to repayment. If such waiver is made by way of exchange for the consent of the Secretary to amend the Agreement, sufficient consideration to make the waiver operative would seem to be present. However, it should be pointed out that the more consent by millers in number sufficient for an amendment of the Agreement cannot be relied upon to extinguish the claim of others who are parties to the Agreement and who have contributed to the marketing fund. No provision is made in the Agreement for the disposition of the fund in the event of the termination of the Agreement, but it would appear that the ultimate beneficial interest rests in the contracting millers according to their respective contributions, and that therefore individual waivers on the part of each such contributing miller would be necessary in order to extinguish all possible claims.

Further question arises as to the authority of the Secretary to enter into such an arrangement. It is clear that if, without consideration moving to him, he accepts a surrender of the millers' claim to repayment, he will be in the position of accepting a gift towards the expenses of the control program, in effect augmenting the appropriations made by Congress for such purpose. Whether the Secretary has authority under the Act to accept such contributions is a matter of doubt on which we express no opinion since the question has not been directly presented. It may be pointed out, however, that apart from considerations of the legal difficulties which may be involved, questions regarding administrative propriety and good faith may well be multiplied by an amendment which would leave in the hands of the Secretary both the 40% payments made in respect to rice purchased by millers from non-cooperating producers and the advance made for initiating the control program, while at the same time leaving producers who have faithfully cooperated in position relatively worse than that of non-cooperating producers.

II. Legal Difficulties in the Carrying Out of Article VIII.

Various objections made by contracting millers to continuing Article VIII have been noted in the memorandum of the Chief of the Rice Section stated

September 6, 1934. Most of these involve questions of an administrative or policy nature only, and in the others the legal aspects are incidental.

It is stated that, until the much delayed adjustment contracts are signed by producers, the contracting millers "cannot purchase rice from producers with knowledge of how to handle the transaction." This objection apparently rests upon the fact that the adjustment contract calls for a Statement of Consent by which lienholders agree that the Secretary may deal with the producer as if he were the sole person having an interest in the land or crop; and the producer represents that the Statement of Consent contains the signature of all persons, other than payees named in the contract, having such interests. It is possible, although by no means certain, that the execution of the Statements of Consent in the adjustment contracts will serve to bar subsequent claims by lienholders against millers on account of the 40% payments made to the Secretary with respect to rice purchased from cooperating producers. It does not appear, however, that this affects the proper handling of the purchase transaction by the millers. By the terms of the Marketing Agreement they are obligated to make the 40% payments, irrespective of the disclosure or non-disclosure, or waiver, of lienholders' claims and irrespective of the execution of any adjustment contracts. The Secretary is therefore entitled to enforce his rights as promises, notwithstanding the delay in issuing the contract forms and notwithstanding the fact that millers may be unable subsequently to defend themselves against lienholders.

It may be argued that the Secretary is under an implied obligation, under the Marketing Agreement, to complete administrative arrangements for carrying out the control program within a reasonable period, and that he is liable for any damage to the millers caused by breach of this obligation. For example, if the delay in issuing the adjustment contracts should have the effect of keeping rice from the market for an unreasonable period, the millers might possibly have a cause of action against the Secretary for damages suffered. But the failure of the Secretary to secure a disclosure or waiver of liens can furnish no ground for suit by the millers, for the reason that the Secretary, by the terms of the Agreement, has assumed no obligation to do so. The provisions made in the adjustment contracts for the execution of Statements of Consent is made for the protection of the Secretary and not pursuant to any contractual obligation assumed by him in behalf of the millers, although they may incidentally be benefitted thereby.

If Article VIII is continued, the obligation of a contracting miller to make such payments will not be discharged by payment of the entire total fixed price to the lienholder and the producer jointly. Section 1(a) of Article VIII provides for two payments, one to the "owner" and one to the Secretary. The amounts of these payments must be such that the payment to the owner equals 60%, and the payment to the Secretary 40%, of the sum of the two. If, therefore, a miller makes a payment to the producer and lienholder jointly, even though such payment equals 100% of the fixed price, he will nevertheless be obligated to make an additional payment to the Secretary in the proportion indicated.

Further, if Article VIII is continued, it does not appear that producers will have any claim against the Secretary unless he fails to make payments from the trust fund by the end of the crop year. Undoubtedly

any delay beyond that time will damage producers, and, if it results from the failure of the millers to make the 40% payments, the producers may well have a cause of action against the millers for breach of the promise made for their benefit. The failure of the millers to pay, however, can afford no cause of action by producers against the Secretary since the Secretary has assumed no obligation under the Agreement to enforce the payments, but has limited his obligation to the distribution of the Trust Fund as created. His obligation, as administrator, to compel the millers to perform stands, of course, upon another basis.

As to claims which lienholders may assert in connection with payments to be made by the Secretary to producers from the trust fund, it is impossible to anticipate in a general opinion the difficulties which may arise. These difficulties may differ from similar problems arising in connection with other control programs because the source of the adjustment payments will not be the proceeds of a processing tax or an appropriation made by Congress but will represent portions of a "price" set by the Secretary upon the product itself. The problems here involved are inherent in the control plan as originally made and do not arise from the delay which has developed in its administration. Nor can they be avoided by the elimination of Article VIII, since payments have already been made to the Secretary against which lienholders may assert claims, extending to payments made upon rice sold by non-cooperating as well as cooperating producers. As to the validity of such claims, opinion is reserved until a direct issue is presented.

Francis M. Shea,
Chief, Opinion Section,
Office of the General Counsel.

No. 127

BENEFIT PAYMENTS FOR HOGS ON BASIS OF
DOMESTIC ALLOTMENT

Benefit payments under the Agricultural Adjustment Act may be made to contracting hog growers upon an allotment which represents their respective share in the domestic market without respect to any agreement to reduce hog production, provided it can be shown that such a program will tend to effectuate the declared policy.

Benefit payments made on this basis at the rate of \$1.00 a head in all probability would be defensible provided available economic data indicate the reasonableness of such payments as a basis for the Secretary's determination.

Opinion Section Memorandum No. 179
Dated September 12, 1934.

September 12, 1934.

MEMORANDUM TO MR. DAVIS

Pursuant to your request of September 10, 1934, I submit the following opinion.

Question

Could benefit payments be made to contracting hog growers on an allotment which represents their respective shares in the domestic market without respect to any agreement to reduce hog production, and if so, would \$1.00 per head be defensible as reasonable and fair if the question is raised in Court?

Opinion

It is my opinion that benefit payments may be made on domestic allotments of hogs provided supporting economic memoranda establish that such a program will effectuate the declared policy of the Act.

Benefit payments at \$1.00 a head would in all probability be defensible but again the supporting economic memoranda to show the reasonableness of such payments should be furnished the Secretary as a basis of his finding.

Discussion

Section 8 (1) of the Agricultural Adjustment Act provides that:

"Sec. 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power --

(1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity through agreements with producers or by other voluntary methods and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments.
"

It is clear from the Legislative History that it was intended by the Senate Amendment represented by the underscored words in the above quotation to permit the Secretary to make benefit payments on that part of the production of any basic agricultural commodity required for domestic consumption without exacting from those to whom the payments were made agreements to reduce production. In the statement of the Managers on the part

of the House, accompanying H. Rep. 100-- 73rd Cong., the following explanation of this Amendment was given.

"Amendment no. 13. The House bill provided for rental or benefit payments to be made only in connection with reductions in acreage or reductions in production for market or both. The Senate amendment provides that rental or benefit payments may also be made irrespective of any reduction in acreage or reduction in production provided the rental or benefit payments are limited to that portion of the production of the commodity that is required for domestic consumption. The House recedes."

This provision would therefore seem to justify allotments to the producers of hogs representing their fair proportion of the requirements for domestic consumption and provision for benefit payments upon their production to the extent of such allotments. However, there are restrictions upon a benefit payment program even where it is carried out under the domestic allotment clause of Section 8(1). Those restrictions are represented by the declared policy of the Act. The benefit payments on domestic allotments are permitted to be made only for the purpose of effectuating the declared policy. An analysis of the declared policy is therefore necessary as basis for justifying the proposed benefit payment program. The provision in question reads as follows:

"Sec. 2. It is hereby declared to be the policy of Congress--

"(1) To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco shall be in the prewar period, August 1909-July 1914. In the case of tobacco, the base period shall be the postwar period, August 1919- July 1929."

On the basis of this provision the Agricultural Adjustment Act proposes to reestablish prices to farmers solely through the medium of establishing and maintaining a proper balance between production and consumption of agricultural commodities and certain marketing conditions therefor. It must therefore be established that benefit payments on domestic allotments of hogs will establish such a balance and will lead to reestablishing prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. As to the economic material which can be adduced to support domestic allotment payments on hogs under the foregoing analysis, this, of course, must be left to the economists, but suggestions of the type of support required might

be indicated. If, for instance, the following line of argument can be established it must justify the proposed program. In the absence of domestic allotment payments, farmers will sharply increase their production in an effort to make up for excessively low return by high production. If domestic allotment payments are made, the farmer will be assured a fair return on his domestic allotment. He will, therefore, not be tempted to produce greatly in excess of that allotment, because having an assured return he will not wish to chance probable losses on the excess production.

Again, an attempt might be made to establish by economic memoranda that at the present point in the adjustment program it is desired to stabilize production and that domestic allotment payments will effectuate this purpose.

The proposed payment of \$1.00 a head would seem to be defensible. The amount of the benefit payment to be made under Section 8(1) of the Agricultural Adjustment Act is to be such as the Secretary deems fair and reasonable. Under Section 10(e), of the Act, the amount of such payments is not subject to a review by any officer of the Government other than the Secretary of Agriculture or the Secretary of the Treasury. The Secretary has therefore the widest discretion as to what payments are fair and reasonable. Economic support, however, should be given to such a determination. It should, for instance, be indicated that in making payments per head instead of on poundage no discrimination as between producers is involved and also that measurements per head can be fairly averaged so that requirements for domestic consumption can be reasonably computed in terms of the number of animals produced.

Francis M. Shea,
Chief, Opinion Section,
Office of General Counsel.

No. 128

HOG PRODUCTION PROGRAM FOR PRODUCERS OF
HOGS OR OF CORN AND HOGS

A hog production program by which benefit payments are to be made to producers of both corn and hogs who agree to restrict their corn acreage, and to producers of hogs (and not corn) who agree to restrict hog production, may be within the terms of the Agricultural Adjustment Act, provided that (1) the benefit payments are to be made only to producers of hogs, as such, and (2) an actual reduction in the production of hogs is required to be shown by each producer as consideration for the benefit payment.

September 13, 1934.

MEMORANDUM TO MR. DAVIS

Dear Mr. Davis:

In response to your request for an opinion dated September 12, 1934, I submit the following:

QUESTION PRESENTED

"Can benefit payments be made on hogs with no restriction on the production of hogs in the case of a farmer who produces both corn and hogs and who agrees to restrict his corn acreage, and in the same program require a restriction of hog production in the case of a farmer who produces only hogs and therefore cannot restrict corn acreage?"

OPINION

It is my opinion that such a benefit payment program can be brought within the terms of the Act if (1) it provides that the benefit payments shall be made to the producers of hogs, as such, and (2) in the case of each producer an actual reduction in the production of hogs is shown in return for the benefit payment.

DISCUSSION

The provisions of the Agricultural Adjustment Act pertinent to the immediate issue read as follows:

"Sec. 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power --

(1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the

production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments.
* * *

"Sec. 9. (a) * * * When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. * * * "

It seems to be indicated by the terms of these provisions:

(1) That a processing tax may not be put into effect with respect to any basic agricultural commodity unless benefit payments are being made to persons who have effected a reduction in acreage or a reduction in production for market of the particular basic agricultural commodity upon the processing of which the tax is levied;

(2) That the benefit payments must be made to the producers of the basic agricultural commodity with respect to which reductions are being effected (Within the meaning of the term producer in this connection I should include share tenants, share croppers and others having an interest in the crop and whose cooperation is necessary to legally effectuate a reduction of production. It is not intended to pass upon the exact dimensions of the word "producer", however, in this memorandum);

(3) That benefit payments may not be made except in return for effecting or agreeing to effect a reduction in the acreage or in production for market of the basic agricultural commodity with respect to which the benefit payments are made. (This, of course, does not mean to exclude the possibility of benefit payments on domestic allotments. However, the provision of Section 8 (1) which permits such payments is not available with reference to the particular program here in issue);

(4) That the benefit payments must be offered to all producers of the basic agricultural commodity (allowing, of course, for the possibility of a regional or market classification which would permit a benefit program to be confined to a particular classification of the basic agricultural commodity).

A brief analysis of the provisions of Section 8 (1) and section 9(a) will serve to establish that the principles above outlined definitely mark the limitations of the Secretary's authority to make rental and benefit payments and to levy processing

taxes under the Agricultural Adjustment Act. Section 9(a) authorizes a processing tax with respect to a basic agricultural commodity only when the Secretary determines that rental or benefit payments are to be made with respect to that basic agricultural commodity. The words of the statute compel this construction. There does not seem to be any ambiguity which would permit an alternative interpretation. As the provisions of Section 8 (1) clearly contemplate that the reduction shall be secured by the voluntary cooperation of those having the property interest in the acreage or in the commodity as to which a reduction in acreage or in production for market is to be effected, these provisions of the Act would seem to require not only that the benefit payments be made to secure a reduction in production as to the particular basic agricultural commodity with reference to which a tax is levied but also that these payments shall be made to those who can voluntarily reduce the acreage or production for market.

Apart from the domestic allotment provision of section 8 (1) the only authority to make benefit payments is in order "to provide for reduction in the acreage or reduction in the production for market or both", of the basic agricultural commodity, hence it must be shown that such a reduction has actually been effected or that a binding obligation to effect it has been secured in order to authorize benefit payments being made.

Finally, though the wording of the Act upon verbal analysis may not compel a construction requiring that all producers of a particular basic agricultural commodity shall be admitted to participation in any benefit payment program, it is clearly the import of the whole Act and its legislative history that all producers were to share in the benefits. In short, discrimination among those who are to be permitted to cooperate in reduction programs is not authorized by the Act. (To be sure, section 11 permits that a regional or market classification of a basic agricultural commodity may itself be deemed a basic agricultural commodity and consequently with reference to section 8 (1) would authorize a benefit payment program confined to such regional or market classification). Moreover, apart from the basis for this construction which may be found in the words of the Act and its legislative history, the constitutional difficulties which would be encountered were the Act to be interpreted as permitting discrimination amongst those who were allowed to join in a reduction program, would compel the interpretation suggested. It would be difficult to sustain, for instance, a position that the tax was for a public purpose if any clear discrimination in bestowing its benefits were shown.

Testing the proposed program, according to these constructions of the pertinent provisions of the Agricultural Adjustment Act, the following conclusions are arrived at:

(1) The Secretary is required to open the reduction program to all producers of hogs and offer benefit payments to any one who agree to cooperate. Though regional or market classifications of hogs might be made and certain classifications excluded from the program, a classification which put in one class those who produced hogs from corn which they raised, and in another class those who produced hogs from corn they purchased from others, would not constitute a regional or market classification. However, the fact that the Secretary must afford like benefits to all producers does not mean that he may not for convenience of administration require different proof of cooperation from classes whose circumstances of production differ, or that he may not require different types of performance from classes of producers whose production is carried on by different methods, etc. Hence, provided it may be shown that the benefits offered producers of hogs who grow their own feed and the benefits offered those who purchase feed for hog production are substantially the same, there would seem to be no serious objection to the Secretary's measuring performance by one class according to a method differing from that used in measuring the performance by the other class.

(2) Supposing the analysis under point 1, therefore, to justify on any issue of discrimination payments to those who produce only hogs and purchase corn necessary for feed measured by proof of actual poundage of hogs produced, and at the same time payments to those producing both corn and hogs measured by reductions in the amount of corn produced, we are still faced with several further questions:

Are these benefit payments actually made to the producers of hogs in their capacity as such producers? Do the benefit payments in fact effect a reduction in production of hogs for market? Each of these questions would have to be answered in the affirmative if the program is to be justified. An argument, therefore, to the effect that a program which will effectuate reductions in the production of corn will result in reducing the overall production of hogs, will not justify a benefit payment program such as that proposed nor the levying of processing taxes on hogs. If that argument, for instance, means that whereas the corn producers are a different group than the hogs producers, nevertheless if the corn producers cut down their production, the hog producers will be deprived of the necessary feed to keep their production at its present level, this would clearly not justify the program. In that case it would mean not the reduction by voluntary cooperation of the producers of hogs but an exercise of coercion on the producers of hogs by the voluntary reduction on the part of the producers of corn. Nor again could the program be justified by proof of reduction in the production of corn unless it can be definitely shown that this effects a reduction in the production of hogs in the case of each producer to whom the benefit payment for a reduction is given.

It seems to me, therefore, that the program proposed can be sustained only if it be shown with reference to the producers of both corn and hogs that the payments are reasonably proportioned to their capacity as hog producers and not as corn producers, and also that as to each producer receiving a benefit payment, he has actually reduced his production of hogs. In order to sustain these propositions, it is my opinion that it would be necessary to show (1) that there is a reasonably accurate correlation between the amount of hogs produced and the amount of feed used in their production, and (2) that a reduction in the corn acreage by a particular producer actually results in the reduction of the amount of feed used in the production of hogs. This would require proof that the producer used only his own corn in the hog production. Only on such a basis as this, in my opinion, would we be able to feel any confidence in justifying our position that it was a fair measure of reduction in hogs to accept proof of reduction in production of corn, should we be precipitated in litigation.

Francis M. Shea,
Chief, Opinion Section,
Office of the General Counsel.

PROHIBITIVE RESTRICTIONS UPON IMPORTED BUTTER

The Secretary has no authority under the Agricultural Adjustment Act to impose a tax, or to fix a price, upon imported butter for the purpose of excluding it from the domestic market.

September 13, 1934

MEMORANDUM TO MR. GAUMNITZ

In reply to your memorandum of August 10, supplemented by conference, I submit my opinion upon the following:

QUESTION

May the Secretary, in order to effectuate the policy of the Act, impose a prohibitive tax or fee, or establish a prohibitive price, upon imported butter?

OPINION

The Secretary has no authority under the Act to impose a tax or to fix a price upon imported butter for the purpose of excluding it from the market.

STATEMENT OF FACTS

Under the licenses being issued under the Act to milk distributors, minimum prices are established which recognize what is considered to be a "normal" relationship between prices of milk for fluid distribution and prices of milk for manufacturing purposes. The drought, coupled with large purchases of butter by the Agricultural Adjustment Administration, has had the effect of raising the price of butter so that it is anticipated that the price may be increased to 29¢ per pound, a point at which it is probable that butter will be imported over the present tariff of 14¢ a pound. In such event a further increase in the price of butter is improbable, and it is anticipated that the "normal" relationship between the price of various classes of milk as recognized in milk licenses will be **dislocated**. It is proposed, for this reason, to levy a tax upon, or to establish a minimum selling price for, imported butter which will have the effect of raising the price above the price for domestic butter sufficiently to keep it off the market.

DISCUSSION

It will be assumed for the purposes of this memorandum, although it does not clearly appear from the facts above stated, that the proposed procedure would tend to effectuate the policy of the Act.

The possibility of the levy of a tax by the Secretary is readily dismissed. It is a cardinal rule of construction that the power to tax must be specifically conferred and is not to be implied from words of general import. By the Act the Secretary is expressly authorized to provide for a processing tax upon any basic agricultural commodity in respect to which benefit payments are to be made, and also for a processing tax upon competing commodities. He is further authorized to provide for a tax upon imported articles processed or manufactured in chief value from a commodity upon which a processing tax is in effect. No power is conferred to provide for the levy of a tax except as a consequence of the institution of a production program to be supported by rental or benefit payments.

The power of the Secretary under the Agricultural Adjustment Act to fix prices at which agricultural commodities and products may be sold is limited to licenses under Section 8(3). An opinion has already been given, with respect to licenses issued under this Section, that they may not prohibit directly the importation of such commodities, even though it may be shown that the exclusion of such commodities would tend to effectuate the policy of the Act. Op. Sec. Mem. No. 115. That opinion rests primarily upon the ground that the language of Section 8(3) is not appropriate to confer such powers. The fact that Congress has explicitly provided, as in Section 15(e) and Section 17(a), for meeting certain import and export situations likely to arise under the Act is indication in itself that Congress did not, by merely general language in other sections of the Act, intend to confer authority upon the Secretary to impose restrictions upon imports as such. More generally, the particularity with which Congress has traditionally legislated upon matters having to do with imports, the care with which it has provided the mode of procedure for administrative officers authorized to act in matters of import restriction, and the very specific legislation which it has enacted during the present emergency, all preclude a construction of Section 8(3) as authorizing the Secretary, through the issuance of licenses, to prohibit imports.

The present proposal to fix a minimum price at which imported butter may be sold in the domestic market would not prohibit the actual entry of foreign butter. However, the standard by which it is proposed to fix such price is determined with relation to the price of imported butter and has as its sole object the exclusion of the imported product from the commercial market. The purpose and the effect of such price is not to be distinguished from a provision which in terms prohibits the importation of butter from other countries. The effect is the same as that of a prohibitive increase in the prevailing tariff rate of 14¢ per pound, without reference to costs

of production or to flexible provisions of the Tariff Act of 1930. Since the Tariff Act, in fixing tariff barriers is expressive of a national policy as to the terms on which foreign goods may be permitted to compete in the domestic market, the setting of prohibitive prices after entry may well be deemed to be "in conflict with existing acts of Congress" and therefore specifically excluded under the terms of Section 8(7). The conflict anticipated as likely to arise between the Tariff Act and codes or agreements under the National Industrial Recovery Act was specifically provided for in that Act by Section 3(e) authorizing the President to invoke the investigatory powers of the Tariff Commission and to impose necessary conditions and restrictions. The Agricultural Adjustment Act contains no similar provision for special treatment of imports to support marketing agreements and licenses, but, on the contrary, appears to exclude such treatment when it would be opposed to the policy of other acts of Congress.

We would not be understood to conclude that the Secretary may not, upon proper occasion, extend his licensing powers to distributors of imported butter as such. Conditions may arise which would make such licensing appropriate and justify the setting of a minimum price not discriminatory as compared with regulations imposed upon handlers of the domestic product. We do conclude, however, that the Secretary is without authority, by the use of the licensing power, to fix prices by a standard solely designed to exclude imported butter from the domestic market.

Francis M. Shea,
Chief, Opinion Section,
Office of the General Counsel.

No. 130

APPLICATION OF FEDERAL EMPLOYEES' COMPENSATION ACT
TO EMPLOYEES OF MILK MARKET ADMINISTRATOR

The persons employed by the Milk Market Administrator of the Detroit Sales Area are entitled to the rights, privileges and benefits provided for in the Federal Employees' Compensation Act of 1916, as amended.

The Milk Market Administrator of the Detroit Sales Area may not apply either to the Michigan "Accident Fund" or to private insurance companies for compensation insurance to cover persons employed by him pursuant to the Milk License for the Detroit Sales Area.

September 13, 1934

MEMORANDUM TO MR. PRESSMAN

Pursuant to your request, I submit herewith an opinion upon the question you have presented as to whether employees of the office of the Milk Market Administrator of the Detroit Sales Area should be covered by compensation insurance and how application for such insurance should be made. Your request may be divided into two subquestions:

QUESTION

1. Are the persons employed by the Milk Market Administrator of the Detroit Sales Area entitled, under the Federal Employees' Compensation Act of 1916, as amended, to the rights, privileges and benefits provided for in that Act?
2. May the Milk Market Administrator of the Detroit Sales Area apply to the Michigan "Accident Fund" or to private insurance companies for compensation insurance for persons employed by him, the premiums to be paid out of funds available under the milk license for operating expenses?

OPINION

1. The persons employed by the Milk Market Administrator of the Detroit Sales Area are entitled to the rights, privileges and benefits provided for in the Federal Employees' Compensation Act of 1916, as amended.
2. The Milk Market Administrator of the Detroit Sales Area should not apply either to the Michigan "Accident Fund" or to private insurance companies for compensation insurance to cover persons employed by him pursuant to the Milk License for the Detroit Sales Area.

DISCUSSION

A license for milk for the Detroit Sales Area has been issued by the Secretary of Agriculture under the authority of Section 8 of the Agricultural Adjustment Act. The Section in part provides as follows:

"Section 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power --

"(3) To issue licenses permitting processors, associations of producers and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof.

* * *."

Pursuant to Section E, Exhibit A, of the Milk License for the Detroit Sales Area, the Secretary has designated a Market Administrator for the purpose of administering the license in that area. The License specifically defines the duties and enumerates the powers of the Market Administrator. Section E, Exhibit A, of the License provides that the Market Administrator shall be entitled, among his other powers, to incur such expenses, including compensation for persons employed by him, as he may deem necessary for the proper conduct of his duties. The Market Administrator and the persons employed by him are paid out of deductions which section D, Exhibit A of the license requires each distributor to make from payments made by him to producers and to pay to the Market Administrator. It is under these facts that question arises both as to the eligibility of persons employed by the Market Administrator to the benefits provided for in the Federal Employees' Compensation Act, and as to the power of the Market Administrator to apply for compensation insurance to cover employees injured in the performance of their duties under the Milk license.

I

The persons employed by the Milk Market Administrator of the Detroit Sales Area are entitled to the rights, privileges and benefits provided for in the Federal Employees' Compensation Act of 1916, as amended.

The Federal Employees' Compensation Act of 1916 provides, in part, as follows:

"That the United States shall pay compensation as hereafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty * * *". (5 U.S.C.A. Sec. 751)

The term "employee" is defined as including "all civil employees of the United States and of the Panama Railroad Company". (5 U.S.C.A. Sec. 790)

Administration is placed in the hands of a commission "empowered to make necessary rules and regulations for the enforcement of this chapter and decide all questions arising under this chapter". (5 U.S.C.A. Sec. 783). The decisions and interpretations of the Compensation Commission are conclusive insofar as it is necessary to determine the persons who are qualified to partake of the benefits of the Act. United States v. Griffith, 2 Fed. (2d) 925 (1924); 31 Opinions, Atty. Gen. 252, (1918); 33 Opinions, Atty. Gen. 476 (1923). In the latter opinion the Attorney General declared:

"It scarcely appears reasonable to suppose that Congress with a desire to eradicate shortcomings that existed under the Act of 1908 would establish a commission, endow it with powers to pass upon questions arising under the Act which brought it into being, and in order to facilitate the functioning of such a body, create a fund for its express and exclusive use, if its intention was otherwise than to make it the final judge, so far as other departments and officials are concerned, upon matters within the sphere of the Act aforesaid.

"It is therefore my opinion that the Employees' Compensation Commission has the power by virtue of the Act under which it was created to construe the terms of said Act, and that any construction so rendered is final and beyond interference of other governmental officials". (P 478, 479)

The Compensation Commission has declared that two fundamental prerequisites are necessary to establish the status of civil employees within the Act. First, the claimant must at the time of injury be "under the administrative control in the performance of his duties of a Department or other agency of the United States"; and, second, his pay must arise from Federal funds or appropriations. (36 Opinions Atty. Gen. 111 (1929); 34 Opinions, Atty. Gen. 363 (1925); Letter of Chairman of United States Employees' Compensation Commission, dated August 9, 1934, addressed to

the Administrator of the Agricultural Adjustment Administration; Memorandum of Solicitor of Department of Agriculture, dated July 29, 1931, addressed to Chief, Bureau of Agricultural Economics.

The persons employed by the Market Administrator of the Detroit Sales Area are clearly within the requirement of the Compensation Commission that the claimants shall be under the administrative control of a Department or other agency of the United States. The employees are under the direction of the Milk Market Administrator who is, in turn, subject to the control of the Secretary of Agriculture. In an opinion dated March 8, 1934 (Op. Sec. Mem. No. 44) it was determined that a Milk Market Administrator appointed under the terms of a typical Milk License was an "officer of the United States". His position was distinguished from that of a mere government employee, the latter being defined as one who renders assistance to a public officer in the performance of his functions. (31 Opinions, Atty. Gen. 201 (1918)). The Milk License for the Detroit Sales Area in its provisions regarding the Milk Market Administrator and his employees does not differ materially from the typical milk license considered in the Opinion No. 44. The Milk Market Administrator for the Detroit Sales Area is therefore a public officer, and persons employed by him are thus within the administrative control of an agency of the United States since they perform their duties under the direction and control of the Milk Market Administrator. Persuasive to this conclusion is the ruling of the Compensation Commission that persons employed by Production Control Associations established under the various commodity production programs are "within the administrative control in the performance of their duties of a department or other agency of the United States" within the requirement of the Federal Employees' Compensation Act. (See letter of Chairman of United States Employees' Compensation Commission, supra).

Moreover, I am of the opinion that the pay of persons employed by the Market Administrator in the Detroit Sales Area "arises from Federal funds". The monies with which the employees are paid are derived, as has been previously noted, from deductions which Section D, Exhibit A, of the milk license requires that distributors shall make from payments made to producers for milk delivered to distributors under the License. The monies are in the nature of involuntary contributions, exacted under the authority of a milk license issued pursuant to a Federal statute, and to be used for purposes of a public nature. Such monies would seem to constitute "federal funds".

Attention is again directed to the letter of the Chairman of the Federal Employees' Compensation Commission, dated August 9, 1934, addressed to the Administrator of the Agricultural Adjustment Administration which declared that persons employed by Production Control Associations are "employees" within the terms of the Federal Employees' Compensation Act. The employees of the Production Control Associations are paid from funds obtained by the Association from deductions from benefit payments made to

producers under the terms of the various benefit contracts. Although the benefit payments are made from funds appropriated under Sections 12(a) and 12(b) of the Agricultural Adjustment Act, the monies paid to the Production Control Associations for operating expenses, including the compensation of employees, are in effect contributions from producers since they represent deductions from the benefit payments. Since the monies paid to the Associations are "Federal funds or appropriations" within the requirement of the Compensation Commission that the pay of employees "arise from Federal funds or appropriations", it would seem to follow that involuntary contributions, exacted from licensees under the authority of law, and to be used for a public purpose constitute "Federal funds" within the same requirement.

II

The Milk Market Administrator of the Detroit Sales Area may not apply either to the Michigan "Accident Fund" or to private insurance companies for compensation insurance to cover persons employed by him pursuant to the Milk License for the Detroit Sales Area.

Section 8464, Chapter 150, Compiled Laws of Michigan (1929) provides that all employers who elect to be subject to the provisions of the Workmen's Compensation Law may upon their written request obtain compensation insurance from the "Accident Fund" administered by the State Administrative Board. The same section provides that the Board may levy and collect premiums and assessments from such employers and disburse compensation under the provisions of the Act. No employer in the State of Michigan is qualified to ask for "Accident Fund" insurance unless he agrees to be subject to the provisions of the state Workmen's Compensation Law.

It has been previously determined that Production Control Associations are not subject to state Workmen's Compensation Laws since they are Federal instrumentalities (Op. Sec. Memo. No. 139). For the same reason state Workmen's Compensation Laws are inapplicable to a Milk Market Administrator. The Michigan Workmen's Compensation Law is, however, elective rather than mandatory upon the employer and the question arises whether the Market Administrator of the Detroit Sales Area may apply for insurance to the State "Accident Fund" where such application subjects him to the provisions of the state Workmen's Compensation Law.

The Market Administrator of the Detroit Sales Area may not apply for compensation insurance to the "Accident Fund" even though he is adjudged eligible under the Michigan law to make such application. The reasons for this conclusion are twofold. First, the obligations imposed

by the Michigan Workmen's Compensation laws are inconsistent with the terms of the milk license and interfere with the proper execution of the license by the Milk Market Administrator. For example, Section 8471, Chapter 150, Compiled Laws of Michigan (1929) provides that the State Administrative Board may have access to the books, records, and payrolls of all employers who have elected to obtain the "Accident Fund" insurance, and if such inspection is refused a penalty is to be imposed by the Board upon the employer. Such a privilege granted to the State authorities may well run counter to the commitment of the Market Administrator and the Secretary of Agriculture to keep confidential all information furnished pursuant to the license.

Secondly, the monies derived under the license may not be paid out by the Market Administrator for the purpose of obtaining compensation insurance for persons employed by him whether the insurance be obtained from the Michigan "Accident Fund" or from private insurance companies. The Milk License for the Detroit Sales Area in Section D, Exhibit A thereof provides that certain payments retained by the Market Administrator may be used "to meet his cost of operation", and in Section E, Exhibit A, the Market Administrator is empowered "to incur such other expenses * * * as the Market Administrator shall deem necessary for the proper conduct of his duties * * *". The use by the Market Administrator of these monies to obtain compensation insurance from either the "Accident Fund" or from private insurance companies for persons employed by him can be justified only on the ground that this action is necessary either to protect the United States or the Market Administrator from actions brought against them by injured employees, or to protect the injured employees.

However, I am of the opinion that neither the United States nor the Market Administrator is liable to parties injured in performance of their duties under the license, and that the injured employees are amply protected under the Federal Employees' Compensation Act. The United States as a sovereign is not liable to suits in tort, unless it gives its consent to be sued. Schillinger v. United States, 155 U.S. 163 (1894); Basso v. United States, 239 U. S. 602 (1916). The United States has not consented to be sued in tort. Moreover, the Market Administrator, as has been pointed out supra, is an officer of the United States and his duties and powers are specifically defined in the Milk License for the Detroit Sales Area issued pursuant to the Agricultural Adjustment Act. The Market Administrator is therefore not personally liable where he acts within the scope of his authority. United States v. The Paquete Habana, 189 U. S. 453 (1903); Davis v. Young, 248 S.W. 409 (1923). Since the Market Administrator is an agent of the United States Government, persons hired by him are employees of the United States rather than employees of the Administrator. The Market Administrator does not pay the employees personally out of his personal funds but out of funds obtained under the authority of the license and he may assign them only such duties as are necessary for the performance of the terms of the milk license.

If this determination that the Market Administrator is not personally liable to injured employees and that the employees are amply protected under the Federal Employees' Compensation Act is correct, it would seem improper for the Market Administrator to charge to "operating expenses" funds paid out to obtain compensation insurance for persons employed by him. However, in the event the United States Employees' Compensation Commission refuses to allow the claims of employees injured in performance of their duties under the milk license to the benefits provided for in the Federal Employees' Compensation Act, the funds available under the Milk License for the Detroit Sales Area may be used to obtain compensation insurance from private insurance companies. Protection of persons employed by the Market Administrator under the authority of the milk license would appear to be a valid "operating expense" within the meaning of that term as used in the license.

CONCLUSION

Although I am of the opinion that persons employed by the Market Administrator are eligible to the benefits under the Federal Employees' Compensation Act, there remains a possibility that the United States Workmen's Compensation Commission will rule that the employees' pay does not "arise from Federal funds or appropriations". For the purpose of clearing up this uncertainty, a request for a ruling on the question should be made to the United States Employees' Compensation Commission.

Francis M. Shea,
Chief, Brief and Opinion Section,
Office of the General Counsel.

No. 131

PAYMENT TO OWNERS UNDER COTTON ACREAGE

REDUCTION CONTRACTS WHEN MANAGING SHARE

TENANT FAILS TO PERFORM

When a 1934 and 1935 Cotton Acreage Reduction Contract has been signed by the owner and by the managing share tenant, with respect to each of the farms owned by him, and the promise to reduce acreage is not performed, the owner is not entitled to rental payments under the contract.

Opinion Section Memorandum No. 184
Dated September 13, 1934 .

1911

THE UNITED STATES OF AMERICA
DEPARTMENT OF AGRICULTURE
BUREAU OF PLANT INDUSTRY
WASHINGTON, D. C.

REPORT OF THE
COMMISSIONER OF PLANT INDUSTRY
FOR THE YEAR 1911
CONTAINING
A SUMMARY OF THE WORK OF THE
BUREAU OF PLANT INDUSTRY
DURING THE YEAR 1911
AND A LIST OF THE PLANTS
INTRODUCED INTO THE
UNITED STATES DURING THE YEAR 1911

WASHINGTON: GOVERNMENT PRINTING OFFICE
1912

September 13, 1934

MEMORANDUM TO MR. McCONAUGHEY, ACTING CHIEF,
BENEFIT CONTRACT SECTION

Re: 1934 and 1935 Cotton Reduction Contract

Your memorandum of September 6, 1934, raises an additional question in connection with the problem involved in our Opinion No. 155, which dealt with the rights of the managing share-tenant under the 1934 and 1935 Cotton Acreage Reduction Contract in the event of a breach by the owner. I accordingly submit my opinion upon the following:

QUESTION

When a 1934 and 1935 Cotton Acreage Reduction Contract has been signed by the owner and by the Managing share-tenant, with respect to each of the farms owned by him, and the managing share-tenant in each case fails to perform, is the owner entitled to 50% of the rental payments under each of the contracts?

OPINION

By his signature the owner obligates himself, jointly with the managing share-tenant, to secure reduction upon the farm which is the subject of the Contract. He is therefore not entitled to rental payments unless proof of reduction is made in the manner required by the Contract.

DISCUSSION

The essential question here presented is: What is the obligation of the owner with respect to the reduction of acreage on the farm which is the subject of the Contract?

In our previous opinion it was concluded that the managing share-tenant had no obligation as to the making of contracts upon other farms belonging to the owner and over which the tenant had

no actual control. This conclusion did not rest upon any specific apportionment of obligations, as between owner and tenant, made by the terms of the Contract itself. It was based upon the fact that a contrary construction would be inconsistent with the purpose of the Contract, that it would result in needless hardship to the tenant and defeat the declared intention of the government that those cooperating in the control program should fare better than those who do not.

Similar considerations, in the absence of specific provisions in the Contract, lead to the conclusion that the obligation of the owner does extend to the reduction feature of the contract and that, as to this, he is a joint promissor with the tenant. If this were not so, payments designed to secure a reduction of acreage and to benefit producers would be payable to owners notwithstanding a total failure to accomplish reduction. The consideration moving to the Secretary from the owner would in such case be limited to the latter's promise not to grow cotton on other lands not covered by a reduction contract and to an implied permission to the tenant to reduce the crop. Nothing in the terms of the Contract seems to us to require so narrow a construction. In our previous opinion it was concluded that the term "producer" as used in Part I setting forth the required performance includes both owner and tenant. It is similarly inclusive as used in Part II with reference to "performance by the producer" and the presentation of proof of performance. The question is not who is the "producer", but whether the obligation to reduce production is one resting upon the tenant alone or upon the tenant and the owner jointly. In our previous opinion it was concluded that the owner and the managing share-tenant are not joint promissors of the entire performance required under Part I. It does not follow that they may not be in the position of joint promissors as to the obligation to reduce production. Nor does it matter that no positive acts of performance are required on the part of the owner. If the owner, by joining with the tenant in the promise, has guaranteed performance by the latter, he can be entitled to no payment until the condition precedent is satisfied by the making of the required proof.

That the obligation assumed is joint seems to us the reasonable construction of the Contract, and is the only one consistent with the effectuation of its purpose. The relationship of owner and tenant, even a managing share-tenant, is ordinarily of such a nature that the owner has some means of compelling the tenant to carry out the promised reduction, and, conversely, the tenant's failure to perform can hardly be unaccompanied by an attitude of connivance or consent on the part of the landlord. The Contract, if construed as binding the Secretary to make rental payments although the principal obligation remains unfulfilled, would thus lend itself to collusion between owner and tenant and would be far less effectual than if construed as jointly binding.

The suggestion is made that the word "producer" as used in Part I applies "to either or both according to the nature and extent of the control which each has over the land under the relationship existing between the landlord and tenant with respect to each farm." This would leave the construction elastic, to be resolved by the facts in each case. It would accordingly be possible to conclude that, in one case of non-performance of the reduction features, the owner is entitled to rental payments, on the ground that his obligation is wholly divisible from that of the tenant and does not extend to the reduction features, and in another case that he is not so entitled because his promise does extend to acreage reduction. The administrative difficulties which would attend the making of rental payments on such a basis are a reason for avoiding such construction if possible. But it seems to us also unreasonable to give the owner's promise so varying a content when the consideration remains unchanged. Moreover, a promise by the Secretary to make rental payments in any case where reduction had not been accomplished would be inconsistent with the purpose of the Contract as part of the control program. It is our opinion therefore that the Secretary may require performance of the reduction features of the Contract before making payment either to the owner or the tenant.

On page 4 of our previous opinion the owner and tenant are said not to be "joint promissors", and on page 5 the language used indicates that the performance of the owner as to the reduction features of the Contract is complete when he has consented to the reduction. The situation there under consideration, however, was one in which the tenant had fully performed, and the issue involved the owner's failure to enter into contracts covering his other farms. Viewed in relation to their context we believe the statements made on pages 4 and 5 of that opinion are not incorrect, and they are not inconsistent with the conclusion reached upon the present question.

Francis M. Shea,
Chief, Opinion Section,
Office of the General Counsel.

PURCHASE FOR RELIEF PURPOSES OF SUGAR SURPLUS
IN PUERTO RICO, ETC.

Under the provisions of Section 15 (f) of the Agricultural Adjustment Act the Secretary may, in the exercise of his power to remove surpluses from the areas therein enumerated, purchase all surplus sugars of these areas for relief purposes.

Surplus sugar so purchased and imported into the United States for relief purposes need not be charged against the quotas for such areas.

September 14, 1934

MEMORANDUM TO THE SECRETARY

Dear Mr. Secretary:

Pursuant to your inquiry as to whether under Section 15(f) of the Sugar Bill you may purchase surpluses of sugar in the areas to which that section is applicable and import such sugar into the United States for distribution through relief agencies to persons otherwise unable to purchase sugar, without charging it against the quota for such areas, it is my opinion that surplus sugar so purchased by you pursuant to Section 15(f) and imported into the United States for purposes of relief need not be charged against the quotas for such areas.

Section 15(f) of the Agricultural Adjustment Act provides:

"The President, in his discretion, is authorized by proclamation to decree that all or part of the taxes collected from the processing of sugar beets or sugarcane in Puerto Rico, the Territory of Hawaii, the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and/or the island of Guam (if the provisions of this title are made applicable thereto), and/or upon the processing in continental United States of sugar produced in, or coming from, said areas, shall not be covered into the general fund of the Treasury of the United States but shall be held as a separate fund, in the name of the respective area to which related, to be used and expended for the benefit of agriculture and/or paid as rental or benefit payments in connection with the reduction in the acreage, or reduction in the production for market, or both, of sugar beets and/or sugarcane, and/or used and expended for expansion of markets and for removal of surplus agricultural products in such areas, respectively, as the Secretary of Agriculture, with the approval of the President, shall direct."

It will be noted that the language of this provision closely resembles that of Section 12(b) of the Agricultural Adjustment Act which reads:

"In addition to the foregoing, the proceeds derived from all taxes imposed under this title are hereby appropriated to be available to the Secretary of Agriculture for expansion of markets and removal of surplus agricultural products and the following purposes under part 2 of this title: Administrative expenses, rental and benefit payments, and refunds on taxes"

The established administrative interpretation of Section 12(b) has been that under it the Secretary may, by virtue of the phrase "removal of surplus agricultural products", purchase surpluses and dispose of them by distribution for purposes of relief. That he is authorized to acquire such surpluses by purchase is the clearest import of the words. That he may dispose of the surpluses so acquired in any way which will not entrench upon the market seems an equally compelling inference of the provision. It follows, therefore, that where surpluses may be diverted into relief channels, not affecting the current of commercial sales, this course is amply authorized. The correctness of this interpretation of the powers of the Secretary under Section 12(b) is supported by the settled rule that the administrative construction of a statute is entitled to great weight in determining its meaning. United States v. Howell, 5 Cranch. 368 (1809); Edward's Lessee v. Darby, 12 Wheat. 206 (1827). In view of the equally settled principle that identical language in the same statute is presumed to have the same meaning, the Secretary is to be deemed invested with similar powers by the phrase "removal of surplus agricultural products in such areas" in Section 15(f) of the Agricultural Adjustment Act. It follows then that the Secretary is authorized under Section 15(f) to purchase surplus sugar and to distribute it to persons otherwise unable to obtain sugar.

The terms of Section 16(d) of the Agricultural Adjustment Act do not in any way vitiate the position here advanced. This section provides:

"(d) The Secretary of Agriculture is authorized to purchase, out of such proceeds of taxes as are available therefor, during the period this Act is in effect with respect to sugar beets and sugarcane, not in excess of three hundred thousand tons of sugar raw value from the surplus stocks of direct-consumption sugar produced in the United States beet-sugar area, at a price not in excess of the market price for direct consumption sugar on the date of purchase, and to dispose of such sugar by sale or otherwise, including distribution to any organization for the re-

lief of the unemployed, under such conditions and at such times as will tend to effectuate the declared policy of section 8a of this Act. The sugar so purchased shall not be included in the quota for the United States beet-sugar area. All proceeds received by the Secretary of Agriculture, in the exercise of the powers granted hereby, are appropriated to be available to the Secretary of Agriculture for the purposes described in subsections (a) and (b) of section 12 of this Act."

It was pointed out above that/^{on} the consistent administrative interpretation of Section 12(b) that provision affords the Secretary power to make purchases of the type here under discussion. It was also noted that Section 15(f) grants similar powers. It is probable that Section 16(d) is to be construed as limiting the powers of the Secretary to remove the surpluses of a single agricultural commodity; to wit, sugar insofar as those powers depend upon authority granted by Section 12(b). But Section 16(d) may clearly not be read as restricting the power to remove surpluses invested in the Secretary by Section 15 (f). If this be conceded, then it must be concluded that the Secretary's powers under 15(f), remaining unabridged, authorize him to remove surplus sugar with the same freedom that he could have under 12(b) prior to the limitations of 16(d).

Compelling evidence for the position that Section 16(d) of the Agricultural Adjustment Act cuts down exclusively the powers of the Secretary of Agriculture to purchase surplus sugar under Section 12(b) and does not in any way limit his authority to remove surplus agricultural commodities, including sugar, under Section 15(f), is found in the fact that the provisions of Section 16(d) relate merely to the expenditures of funds appropriated by 12(b) and limit only the extent to which these funds may be expended for the purpose of removing sugar surpluses in the United States beet sugar area. Section 16(d) demonstrably relates only to the expenditure of funds under 12(b) as it provides for purchases out of the proceeds of taxes available for the purchase of domestic surplus stocks of sugar. The only funds available for this purpose are those appropriated by 12(b) since the funds appropriated under section 15(f) for the removal of surplus must be expended solely in the territories to which this section relates. Consequently, though Section 16(d) limits the expenditures which the Secretary of Agriculture may make in the removal of surplus sugar in the United States beet sugar area, it in no way cuts down his power to purchase surplus sugar as well as other agricultural commodities under Section 15(f) in the areas to which that section is applicable.

The view here taken is, moreover, supported by the manifest unreasonableness of the contrary position and the extreme unlikelihood that Congress could have intended results required by it.

Section 15(f) was passed as part of the Sugar Bill, a Statute promulgating a program for sugar. The funds established or which may hereafter be established under that provision are derived exclusively from taxes collected from the processing of sugar in or from the areas presently or which may hereafter be covered by Section 15(f). In the enumeration of the purposes for which the fund under 15(f) may be employed, it is specifically provided that these monies shall be "used and expended for . . . reduction in the production for market, or both, of sugar beets and/or sugarcane . . .". In view, therefore, of the ubiquitous reference to sugar throughout the Act and, more specifically, on the basis of the well-established rule of ejusdem generis, it must be concluded that Congress intended that the phrase "removal of surplus agricultural products" in 15(f) granted power to the Secretary to purchase with this fund, if not sugar primarily, at least sugar in addition to other surplus agricultural commodities.

In the face of this intention of Congress a contention that Section 16(d) is exclusive and that the Secretary may purchase surplus sugar pursuant solely to that provision cannot be sustained. On the hypothesis that that provision is exclusive, the Secretary would be powerless under 15(f) to engage in any transaction for the purpose of removing sugar surpluses, and, in contradistinction to the whole tenor of the Section, he would be restricted to purchasing surpluses of agricultural commodities other than sugar. Since such a result is unwarranted by the obvious purport of the entire statute and by settled canons of construction, the premise upon which it is based must be discarded. Only clear language evidencing the intention of Congress to cut down the Secretary's power under 15(f) in this manner would justify such an interpretation. In virtue of the fact that support can be found for this result neither in the legislative history nor within the Act itself, it must be concluded, in view of the broad, remedial terms of Section 15(f) that under that provision the Secretary may in the exercise of his power to remove surpluses from the areas in question purchase the surplus sugars of these areas for relief purposes.

It seems equally a proper interpretation of the Act that sugar purchased by the Secretary for this end need not be charged against the quota for these respective areas.

On ordinary canons of construction it is settled that the United States is not restricted by statutory limitations placed upon private individuals unless it is specifically mentioned in the Act or unless this result is compelled by necessary implication. In re Tidewater Coal Exchange, 280 Fed. 648 (1922); United States v. Birmingham Trust and Savings Co., 258 Fed. 562 (1919). See 26 Op. Atty. Gen. 415 (1917).

It may be contended on the present issue that as Section 16(d) specifically exempts certain government transactions in sugar from the quota provisions there is in this the implication that other government dealings in the commodity were intended to be covered by the quota. Reference to other sections of the Act will demonstrate that this contention cannot be sustained with reference to the purchase of surpluses in the areas to which 15(f) is applicable and their distribution through relief channels in the United States.

By Section 8a(1)(A)(i) of the Agricultural Adjustment Act the Secretary is empowered to

"forbid processors, handlers of sugar, and others from transporting to . . . for consumption in continental United States. . . ."

and from dealing in certain other stated ways with sugar in excess of the quotas established by the Act. The authority of the Secretary to forbid such handling of sugar in excess of quota is, however, not plenary. It is limited by the introductory portion of Section 8a(1), which reads:

"Having due regard to the welfare of domestic producers and to the protection of domestic consumers and to a just relation between the prices received by domestic producers and the prices paid by domestic consumers, the Secretary of Agriculture may, in order to effectuate the declared policy of this Act, from time to time, by orders or regulations . . ."

Even if it were assumed, therefore, that the United States may in some instances be subjected to the quota restrictions of the Act, it is clear from these further provisions that the specific dealings in sugar there in issue are exempt from such restrictions.

In short, the Secretary under Section 8(a) may not prohibit the purchasing and transporting to the United States of sugar in excess of the quotas established for the several areas to which 15(f) is applicable, nor, consequently, charge such sugar against the quota for those

areas, where the purchase is made for distribution among persons otherwise unable to obtain this commodity, since such a prohibition would not effectuate the policy of the Act as expressed in Section 8a(1). Sugar distributed in this manner does not enter the ordinary channels of trade and, as it does not appear on the market, cannot influence the price. By the same token, sugar used for relief purposes clearly is not sugar consumed in the United States within the sense of the Act. The clear purport of the statute, constant reference of the quota provisions to "market" and "price" in the Legislative History, and the uniform administrative construction are unanimous to the effect that the terms "consumed in the United States" and "consumption requirements" as used in the Act refer to sugar which can be absorbed in the ordinary channels of trade. On this interpretation it is obvious that the distribution for relief purposes of sugar to individuals who are not a market for it is not "consumption" and that such sugar is not subject to the Secretary's powers of regulation under the Act. Hence it follows that the purchase of such sugar need not be charged against the quotas.

Nor is any difficulty to be found in reconciling this conclusion with the fact that the surplus sugar authorized to be purchased under 16(d) and exempted from the quota provisions is expressly permitted to be distributed for relief purposes. It is to be noted that the Secretary is authorized to dispose of the sugar acquired under the authority of Section 16(d) not merely through relief channels but also "by sale or otherwise". It might well be that the Congress intended that where the Secretary entered upon the marketing of sugar in the ordinary channels of trade, as he would be permitted to do under Section 16(d), such marketing would be subject to the quota provisions except as specifically exempted by the provisions of that Section. The exemption would therefore become necessary not to free from quota regulations surplus sugar purchased for distribution through relief agencies but such sugar as might be purchased by the Secretary to be distributed through the ordinary trade channels.

It is therefore concluded that the Secretary may purchase surpluses of sugar under the authority of Section 15(f) in the areas to which that section is applicable and bring it into the United States for distribution through relief channels without it being charged against the quotas for such areas.

Respectfully yours,

Seth Thomas,

Solicitor.

No. 133

APPLICATION OF EMERGENCY CATTLE AGREEMENT TO LIEN-
HOLDERS FORECLOSING AFTER APRIL 1, 1934.

A lienholder foreclosing in good faith after April 1, 1934, is not within the term "producer" as employed in the Emergency Cattle Agreement, supplemented by Administrative Ruling No. 3.

September 14, 1934

MEMORANDUM TO COL. PHILIP G. MURPHY
Chief, Commodities Purchase Section.

The following memorandum is submitted in response to your request:

QUESTION

May Administrative Ruling No. 3 - Emergency Cattle Agreement, approved June 1, 1934, be applied in favor of a lienholder, who, after April 1, 1934, in good faith forecloses a lien upon cattle for the amount of loans made both before and after that date, advances subsequent thereto but made solely to preserve the collateral and prevent loss?

OPINION

Administrative Ruling No. 3 may not be applied in favor of a lienholder foreclosing after April 1, 1934.

DISCUSSION

It is clear that such a lienholder does not come within the term "producer" as that term is used in the Emergency Cattle Agreement, since that Agreement requires that the producer must have owned and been in possession of the cattle offered for sale prior to April 1, 1934. Consequently, the question is: Can such lienholder qualify as a producer under an extension or modification of the Emergency Cattle Agreement? That agreement has been modified with respect to the term "producer" only in the cases covered by Administrative Ruling No. 3. That ruling provides:

"In cases where a producer has voluntarily abandoned cattle covered by a mortgage and abandoned farming operations and moved from the farm upon which such cattle were kept, the

owner of the lien on such cattle coming into possession thereof after April 1, 1934, because of such abandonment may, for the purposes of the Emergency Cattle Agreement, sign the agreement as 'producer' and upon approval of the Secretary or his authorized agent the 'purchase payment' may be paid for such cattle. Such contract must be accompanied by evidence of abandonment, including statements signed by at least two disinterested parties and the owner of such lien. Such claim of abandonment shall be reviewed and investigated by the County Drought Relief Service Committee who, if such abandonment is established, shall attach to the contract a certificate by them that they have investigated the claim of abandonment of such cattle and farm and that such claim is true. There shall be written boldly across Section 6 (b) of said contract the following: 'Cattle voluntarily abandoned as per attached claim', and there shall be written boldly across Column 4 of Table A the word 'none'. In no event shall any 'benefit payment' be made under such contract."

It is fundamental that exceptions of modifications which are made to a well established procedure or course of conduct must be strictly construed. It is clear from the safeguards provided for in Administrative Ruling No. 3 that that ruling was intended to cover only the particular situation described therein and was not intended to be construed so as to cover foreclosing lienors.

The question of whether a further ruling admitting foreclosing lienholders to participation in these contracts would be authorized is not considered in this memorandum.

Francis M. Shea,
Chief, Opinion Section,
Office of the General Counsel.

PURCHASE OF CATTLE FROM THE REGIONAL
AGRICULTURAL CREDIT CORPORATION

The Regional Agricultural Credit Corporation cannot render full performance of the obligations imposed upon producers by the Emergency Cattle Agreement, and, in particular, those obligations in exchange for which the "benefit payment" is made, and, therefore, is not entitled to receive a benefit payment upon the sale of cattle to the Secretary; but the Secretary may purchase cattle from the Regional Agricultural Credit Corporation on terms other than those provided for in the Emergency Cattle Agreement.

September 15, 1934.

MEMORANDUM TO MR. H. E. REED
 Acting Chairman, Livestock Purchase Committee

In reply to your request I submit herewith the following:

QUESTION

Is the Regional Agricultural Credit Corporation entitled, upon the sale to the Secretary of cattle taken over by it before April 1, 1934, and at present pastured in drought areas in Nebraska, to both a purchase payment and a so-called "benefit payment"?

OPINION

The Regional Agricultural Credit Corporation cannot render full performance of the obligations imposed upon producers by the Emergency Cattle Agreement, and, in particular, those obligations in exchange for which the "benefit payment" is made, and, therefore, is not entitled to receive a benefit payment upon the sale of cattle to the Secretary; but the Secretary may purchase cattle from the Regional Agricultural Credit Corporation on terms other than those provided for in the Emergency Cattle Agreement.

DISCUSSION

The Emergency Cattle Agreement which is being employed by the Secretary in making purchases of cattle in drought areas provides that the cattle producer receive a purchase payment for the cattle purchased and in addition thereto a further amount which is referred to as a "benefit payment". That agreement provides that:

"The producer agrees:

"(2) to cooperate with further general programs pertaining to the adjustment or reduction of production and/or for the support and balance of the market for

cattle and/or dairy products which may be proffered by the Secretary, pursuant to the Agricultural Adjustment Act, as amended. To execute the agreements necessary to participate in such programs and necessary to share in the payments that may be paid by the Secretary for performance thereof, and the producer agrees that the total or any part thereof of the 'benefit payment' for the cattle described in Table A hereof may be applied to and deducted from any payments he may become entitled to under any such agreement or agreements.

"(5) That he is signing this agreement in consideration of the total payments set forth in columns 4 and 6 of Table A, being made as set forth on lines A and B on the reverse hereof, and recognizes the 'benefit payment' as made in consideration of his participation in the reduction of production effected by this agreement."

It is further provided by Administrative Ruling No. 1 - Emergency Cattle Agreement, approved June 1, 1934, that:

"The amounts due as 'benefit payment' are payable to the producer and are not in payment for cattle * * *."

It will be noted that part of the consideration at least for the "benefit payment" is the agreement of the producer-seller to participate in future programs to reduce surplus, adjust production, and support and balance the market for cattle and/or dairy products and to accept this benefit payment as applicable to any future payments which may become due him under such programs. The Reconstruction Finance Corporation Act (Publication No. 2 - 72nd Congress) provides in section 201 (e) that the Reconstruction Finance Corporation may organize in any of the "twelve Federal Land Bank Districts where it may deem the same to be desirable a regional agricultural credit corporation". These Corporations were to be organized for the purpose of making loans or advances to farmers and stockmen. The powers specifically granted the Corporation do not include the power to purchase cattle or to acquire the ownership thereof. Undoubtedly, however, ownership may be acquired either under foreclosure or upon the surrender of his equity by a borrower. Such acquisition of ownership may be justified as the exercise of a power necessary and incidental to the realization of the loans made by the Corporation in the exercise of its express powers. On the same grounds the Corporation may be empowered to lease acreage and pasture the cattle taken over by it.

But such activities are permitted only for such period as may be necessary to preserve the collateral and enable the Corporation to realize thereon. But it is neither necessary nor incidental to the exercise of its express powers that the Corporation engage in production or operate a farm. It is clear, therefore, that the Regional Agricultural Credit Corporation cannot comply with the requirements necessary to entitle it to receive the benefit payment provided for by the Emergency Cattle Agreement.

It does not follow, however, that the Secretary, therefore, may not buy cattle from the Regional Agricultural Credit Corporation upon some other basis; on the contrary, he may. The Secretary is empowered to purchase cattle to effect a production adjustment, to remove surplus, to support and balance the market, or to relieve the situation created in drought areas by the shortage of feed and thereby prevent the loss of cattle by starvation. Such purchases of cattle are authorized under section 12 (b) of the Agricultural Adjustment Act (Publication No. 10 - 73d Congress), section 2 of the Jones-Connally Cattle Act (Publication No. 142 - 73 rd Congress), and paragraph 2, title II of the Emergency Appropriation Act, fiscal year 1935 (Publication No. 412 - 73rd Congress).

Francis M. Shea,
Chief, Opinion Section,
Office of the General Counsel.

No. 135

TERMINATION OF TAX UNDER BANKHEAD ACT

A proclamation that the tax under the Bankhead Act is abolished would not be inconsistent with the continuance of the processing tax on cotton under the Agricultural Adjustment Act.

Opinion Section Memorandum No. 199
Dated September 18, 1934.

See also Opinion of the Attorney General,
Dated September 22, 1934; in Appendix (A-9).

September 18, 1934.

MEMORANDUM FOR THE SECRETARY

Dear Mr. Secretary:

In reply to your inquiries concerning the termination of the Bankhead Cotton Control Act, the following conclusions are submitted.

The only provision for the suspension of the tax levied by the Bankhead Bill is to be found in Section 2 of that Act, which provides:

"The provisions of this Act shall be effective only with respect to the crop years 1934-1935, but if the President finds that the economic emergency in cotton production and marketing will continue or is likely to continue to exist so that the application of this Act with respect to the crop year 1935-1936 is imperative in order to carry out the policy declared in section 1, he shall so proclaim, and this Act shall be effective with respect to the crop year 1935-1936. If at any time prior to the end of the crop year 1935-1936, the President finds that the economic emergency in cotton production and marketing has ceased to exist, he shall so proclaim, and no tax under this act shall be levied with respect to cotton harvested after the effective date of such proclamation."

The clear import of the language "if . . . he shall so proclaim . . . no tax under this Act shall be levied with respect to cotton harvested after the effective date of such proclamation" is that if the President finds that the economic emergency in cotton production and marketing has ceased to exist, that finding will completely terminate the operation of the Act. The authority of the President to extend the Act to the crop years 1934-1935 is conditional upon a finding that the economic emergency in cotton "will continue or is likely to continue to exist". The express reiteration of the term "continue" in this clause supports conclusively the view that Congress intended the Bill to be extended beyond the current crop year, only if the emergency which was the original occasion of the Act extended to those years. It follows that the finding that the economic emergency no longer exists cannot be limited to this year's cotton crop and the tax

levied thereon. A proclamation to this effect will under Section 2 conclusively terminate the Act.

It has also been suggested that if the President proclaims that the economic emergency in cotton production and marketing has ceased to exist, such a finding would jeopardize the cotton processing taxes and rental and benefit payments under the Agricultural Adjustment Act. It is submitted, however, that since the facts supporting a finding that the emergency which was the occasion of the Bankhead Act no longer exists coincide in no way with those requiring the termination of any provisions of the Agricultural Adjustment Act the ending of the tax under the Bankhead Act would not jeopardize the continuance of the processing taxes on cotton under the Agricultural Adjustment Act.

The condition set down in the Bankhead Act to its termination is that the President find that "the economic emergency in cotton production and marketing has ceased to exist." In accordance with the settled principle that general language must be construed as strictly limited to the immediate objects of the statute, and that the meaning of general words must be restricted in order to carry out the legislative intention (United States v. Kirby, 7 Wall. 482 (1868)); Reiche v. Smythe, 13 Wall. 162 (1871)), the significance of the phrase "economic emergency in cotton production and marketing" must be ascertained by reference to the policy of the Bill and the means taken to remedy the evil which occasioned its passage. This may be found in Section 1 of the Bankhead Act, which provides:

"That in order to relieve the present acute economic emergency in that part of the agricultural industry devoted to cotton production and marketing by diminishing the disparity between prices paid to cotton producers and persons engaged in cotton marketing and prices of other commodities and by restoring purchasing power to such producers and persons so that the restoration of the normal exchange in interstate and foreign commerce of all commodities may be fostered, and to raise revenue to enable the payment of additional benefits to cotton producers under the Agricultural Adjustment Act--

"It is hereby declared to be the policy of Congress to promote the orderly marketing of cotton in inter-

state and foreign commerce; to enable producers of such commodity to stabilize their markets against undue and excessive fluctuations, and to preserve advantageous markets for such commodity, and to prevent unfair competition and practices in putting cotton into the channels of interstate and foreign commerce, and to more effectively balance production and consumption of cotton."
(Italics supplied.)

The underlined phrases in the above Section indicate that, while the Bill constitutes part of the general scheme to relieve the economic dislocation of agriculture which caused the enactment of other recent legislation, it was designed specifically to meet a particular situation in the marketing and production of cotton. The extensive Hearings and Debates in the Senate and the House of Representatives prior to enactment of the Act are replete with statements to the effect that the purpose of the statute was to curb practices in the marketing and production of cotton which had arisen after the promulgation of the program under the Agricultural Adjustment Act and which, if permitted to continue, would render that program ineffective. The explanation of this specific emergency in cotton which the Bill attempted to meet given in the Report of the Committee to the House is representative of these statements and indicates clearly the intention of Congress in passing this measure. It was there said:

"This bill is designed to supplement the cotton program of the Agricultural Adjustment Administration. Further legislation is necessary to promote, during this emergency period, the effective and profitable marketing of cotton * * * The sign-up campaign for the 1934 program has just been completed, and again a large percentage of the cotton growers have cooperated in the program. However, the rental and benefit payments that the Agricultural Adjustment Administration is able to make under these programs are necessarily small in comparison with the price at which cotton will sell if the surplus is eliminated. It is now recognized throughout the Cotton Belt that the success of these programs requires the subordination of individual interests to the general welfare. By refusing to take part in the program and by expanding their

cotton acreage, those who do not cooperate can destroy the voluntary adjustment programs.

"This bill is designed to make cooperation effective by preventing those who do not cooperate, from destroying the cotton - adjustment program. That policy, along with the policy of protecting the marketing by cooperators is accomplished by the levy of a tax on the excess of cotton going into interstate and foreign commerce detrimentally to the whole cotton industry. * * * This bill provides for raising revenue and if the amount of funds capable of being devoted to the cotton program can be increased thereby the desirable policy of furthering the cotton program of the Agricultural Adjustment Administration can be stimulated." (Italics supplied)

It is thus clear that the Bankhead Act constitutes not an attempt to cope with the fundamental emergency in the cotton problem, but is rather an attempt to deal with a particular difficulty in the successful execution of the basic voluntary plan under the Agricultural Adjustment Act. The phrase "economic emergency in cotton production and marketing" in Section 2 of the Bankhead Act accordingly, refers to the destructive influence of the unfair practices of non-cooperators upon the voluntary cotton reduction plan under the Agricultural Adjustment Act which threatened the salutary effects of that program on cotton prices. The system established under the Bill in addition unmistakably supports this interpretation of the emergency contemplated by Congress in passing the instant measure. The primary aim and the sole result of the exemption-certificate system and of the tax on the sale of cotton in excess of the allotments set up in Section 4 of the Act, is the prevention of a glutting of the market by non-cooperating producers. Besides this element of compulsion the statute introduces no element not already to be found in the basic reduction program under the Agricultural Adjustment Act.

Proceeding, therefore, on the ordinary principle of construction, that where the language in a statute is ambiguous, its significance must be determined by looking to the mischief sought to be avoided and the remedy intended to be afforded (*Donn. v. Reid*, 10 Pet. 524 (1836)), it is concluded that the "emergency in cotton production and marketing" referred to in Section 2 of the Bankhead Act is the destructive effect on prices of the unrestricted production and marketing of cotton by non-cooperators in the Agricultural Adjustment Act program, and that when this situation no longer obtains, the President, on finding the facts to be such, may, under Section 2 (a), terminate the tax levied in the Bankhead Act.

In view of this meaning of the phrase "economic emergency in cotton production and marketing" in the Bankhead Act, a proclamation by the President that such emergency no longer exists would have no bearing upon the continuance of the cotton processing taxes under the Agricultural Adjustment Act. The conditions under which these taxes may be terminated are specifically stated in Section 13 of that statute, which reads as follows:

"This title shall cease to be in effect whenever the President finds and proclaims that the national economic emergency in relation to agriculture has been ended; and pending such time the President shall by proclamation terminate with respect to any basis agricultural commodity such provisions of this title as he finds are not requisite to carrying out the declared policy with respect to such commodity.
* * *" (Italics supplied)

Under this provision the cotton processing taxes under Section 9 (a) of the Agricultural Adjustment Act may be ended by the President upon his finding (1) that since the "national economic emergency in relation to agriculture" no longer exists, all of Title 1 (which includes Section 9 (a) is terminated; (2) that these taxes are no longer requisite to carrying out the declared policy with respect to cotton because the aims of the Act in relation to this commodity have been achieved; or (3) that the taxes are abolished because they are no longer adapted to carrying out the policy of the Act in relation to cotton.

In Sections 1 and 2 of the Agriculture Adjustment Act the character of the emergency here referred to and the objectives in view are explicitly stated:

"That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce

in such commodities, and render imperative the immediate enactment of title I of this Act.

Section 2 "It is hereby declared to be the policy of Congress--

(1) To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco shall be the prewar period, August 1909-July 1914. In the case of tobacco, the base period shall be the postwar period, August 1919-July 1929.

(2) To approach such equality of purchasing power to gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets."

In addition to the extensiveness of the economic situation this legislation is avowedly designed to meet the variety, scope and magnitude of the specific remedies provided in the Agricultural Adjustment Act and their delicate adjustment to the declared purpose of achieving parity prices for basic agricultural commodities, conclusively establishes the fact that the emergency referred to in this statute is truly national in scope as distinguished from the particular emergency provided for in the Bankhead Act. It is therefore obvious that a proclamation that the emergency which prompted the passage of the latter Bill no longer exists, can have no influence upon the determination of the President of the question of whether "the national economic emergency in relation to agriculture" under the Agricultural Adjustment Act has been ended.

The irrelevance of a finding that the emergency requiring the Bankhead Act has terminated, on the issue of whether the specific provisions relating to the cotton processing taxes under the Agricultural Adjustment Act must be suspended, is equally clear. In accordance with the terms of the declaration of policy quoted above, the objective of the measures taken in the Agricultural Adjustment Act is the achievement of parity prices; only in the event that cotton attains this price may the processing tax provisions as to cotton be abolished as "not requisite to carrying out the

declared policy with respect to such commodity * * * ". Obviously the fact that the compulsory measures of the Bankhead Act are no longer required to safeguard the voluntary reduction system under the Agricultural Adjustment Act in no way coincides with such a finding. Nor, in the same way, would a declaration that the emergency under the Bankhead Act is ended in any way conclude the President on the issue of whether the provisions relating to the processing taxes are adapted to bringing the price of cotton to parity. In view of the totally different circumstances involved in the determination that the "emergency in cotton production and marketing" under the Bankhead Act has ended, and the finding that the processing taxes must be terminated, it follows that a proclamation that the tax under the Bankhead Act is abolished would not be inconsistent with the continuance of the processing tax on cotton under the Agricultural Adjustment Act.

Respectfully yours,

Seth Thomas.

Solicitor.

ENFORCEMENT OF PROMISES MADE BY PRODUCERS IN
EXCHANGE FOR THE CONSENT OF TENANTS
AND SHARE CROPPERS

When a producer has made promises to his tenants or share-croppers as part of the consideration for the consent of the tenants or share-croppers to his entering into a 1933 cotton benefit contract, the enforcement of such promises is a duty owed to the Secretary, enforceable by set-off against the producer, by suit against the producer to recover back sums already paid out, and possibly by an action of interpleader. These remedies should be reenforced by the promulgation of supplementary rules and regulations.

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September 20, 1934

MEMORANDUM TO MISS BENNETTQUESTION

What power has the Secretary of Agriculture to enforce the promises of producers, principal parties to 1933 cotton benefit contracts, which were given in exchange for the consents of the lienholders? What procedure should be followed in exercising such power as the Secretary may have?

OPINION

The performance of such promises is a duty owed to the Secretary, enforceable by set-off against the producer, by suit against the procedure to recover back sums already paid out, and possibly by an action of interpleader. These remedies should be reenforced by the promulgation of supplementary rules and regulations which will be outlined in the discussion.

DISCUSSION

I.

The promises of the producer to his tenants or croppers incurred as part of the consideration for the consent of tenants or croppers are part of the consideration moving from the producer to the Secretary in exchange for the Secretary's promise of payment.

It is an essential part of the Agricultural Adjustment Program that croppers and tenants receive just shares of the total benefits to be paid. The benefit payments are authorized by Section 8 (1) of the Act as calculated to effectuate the policy of Congress declared in Sec. 2 (1) and (2). They are offered as consideration for the reduction of acreage, and with the further intention of restoring the purchasing power of the farmer to the levels obtaining in the base period.

The beneficiaries intended are the farmers - growers, share-tenants share-croppers - and any other persons having such interest in the land or crop that their cooperation or consent is necessary to effectuate the desired reduction.

There appeared to be insuperable administrative difficulties, however, to admeasuring the interests of croppers, tenants, and other lienholders. The only practical way of distributing the payments was

thought to be by apportioning a sum to each farm as a whole, leaving that sum to be divided amongst those having interests in the farm as their interests may appear. This was to be accomplished in the 1933 contract by requiring the producer to obtain the consent of the lienholder to the producer's offer. The parties would have to agree amongst themselves upon the division and consent to having payment made by check drawn to one of themselves.

That such an agreement was demanded by the Secretary as an essential part of the contract is shown by the stipulation that the Secretary may withdraw from the agreement if the consents are not obtained (Cotton Regulations, Series 1, Sec. 300), or may at his option make payment to all interested parties jointly (Certificate of Performance (7)). The lienholder's interest was to be protected by making his consent prerequisite to any payment to the grower. If his consent to the offer were not obtained, the check would be drawn jointly to the lienholder and producer, and the lienholder's consent would thus be necessary for the collection of the check. On the other hand, to prevent excessive demands by the lienholder, regulations such as Cotton Regulations, Series 1, Section 209, forbade certain unjust agreements in his favor.

This elaborate scheme of provisions shows the intention of the Secretary to insure the payment to the lienholder of a division of the total benefit payment fairly representing his interest.

The promises of the Secretary are consideration for the promises of the grower and for the consent of the lienholder. The consent of the lienholder is consideration for the promises of the grower and of the Secretary. The promises of the grower to the Secretary and lienholder are bargained-for consideration for the consent of the lienholder and the promises of the Secretary. Both sets of promises of the grower are essential to the purposes for which the offer was accepted by the Secretary. The Secretary had an interest in their being made and he has an interest in their performance.

If either promise of the grower is fraudulently made, the Secretary may rescind. If either promise of the grower is not performed, the Secretary may treat such non-performance as a breach of the contract and of its conditions.

II.

The promises of the grower to the lienholder may be enforced by the Secretary by set-off against the producer and by suit against the producer to recover back sums already paid out.

Since the obligation of the producer to pay the lienholder is a duty owed to the Secretary, the Secretary is entitled to see to its performance. He may withhold from any sums due the grower, whether under the 1933 contracts or any other agreements, a sum sufficient to pay the lienholder's claim. It is unnecessary to determine whether this is technically a set-off, since the Secretary is, in any event, entitled to refuse performance on his part where the producer has failed to perform on his. It must be noted, however, that this may be done only when the grower's obligation to the lienholder has matured.

Where the grower has already been paid and there is no sum owing him under other agreements, the Secretary may, on non-performance by the grower, sue to recover back the sums already paid out. However, the law governing the rights of one who has stipulated for another is obscure and it is advisable that the Secretary fortify his position by taking an assignment from the lienholder. The character of this assignment will be discussed in a later section.

It has been suggested that the consents of the lienholders give the Secretary a power, the exercise of which is optional with him, and that he might, therefore, refusing to exercise that power, make payment directly to the lienholders or by check payable jointly to the producers and lienholders. The validity of this argument is doubtful. Clause 7 of the producer's Certificate of Performance provides that the check is to be drawn payable jointly to the order of all persons who appear to have an interest in the crop, unless waivers shall have been obtained. The Secretary, by accepting the producer's offer, construed in connection with this clause of the Certificate of Performance, binds himself to pay to the producer alone unless the necessary consents have not been obtained. It is true that against the croppers or tenants the Secretary may waive his power, but as against the producer he has bound himself by contract to make all payments called for directly to the producer.

III.

It is suggested that the Secretary may best protect the interest of lienholders by the promulgation of certain supplementary rules and regulations.

By rules and regulations, having the force of law, the Secretary may obtain disclosure of the terms of the agreements between producers and lienholders and of the extent to which such agreements have been satisfied, and an automatic assignment of the lienholders' claims against the producers. Such regulations are clearly within the powers of the Secretary. The following draft of supplementary rules and regulations is proposed:

1. Every producer, party to a 1933 cotton benefit contract, must file with the Secretary a statement of his obligations, express or implied, towards croppers and tenants incurred as consideration for the consents to the contract of such croppers and tenants.
2. Any cropper or tenant having a lien on land or cotton affected by such contracts may file with the Secretary a statement of the obligations incurred toward him by the producer as consideration for his consent to the contract.
3. Any such lienholder may make an assignment to the Secretary of his obligations against the producer, taking in exchange an independent obligation of the Secretary to pay over whatever amounts are collected from the producer or withheld in set-off against the payments otherwise due the producer. (This form and character of this assignment will be discussed in a later section).
4. Every producer, party to such contracts, must file with the Secretary before _____ (date) _____ proof of satisfaction of his obligations towards such lienholders, including share-tenants and share-croppers, incurred as consideration for the lienholder's consent to the contract.
5. Every lienholder having an interest in the land or cotton affected by such contract, who has consented to such contract in exchange for promises to him by the producer, must file with the Secretary before _____ (date) _____ a proof of satisfaction to him of the producer's obligation to him or a statement that such obligations have or have not been satisfied.
6. Failure by the lienholder to give such proof will operate as the lienholder's acceptance of the Secretary's offer of an independent obligation in exchange for an assignment by the lienholder of his rights against the producer in the same form as in 3.
7. Failure by the producer to give the proof called for in paragraph 4 will operate to estop the producer to deny the validity of the assignment affected by paragraph 6.

8. These regulations shall be posted in each county, in the office of the County Committee, and in such other places as the Secretary may designate. Such posting shall constitute notice to all producers and lienholders affected by these regulations.

9. On or after _____ (date) and from time to time thereafter, a notice shall be posted in the office of the County Committee and in such other places as the Secretary may designate, stating which growers in the county have satisfied their obligations owing to lienholders incurred as consideration for the lienholders' consent, and stating that all such obligations not satisfied have been assigned to the Secretary. Such postings shall constitute notices to all producers and lienholders affected by these regulations.

IV.

It is desirable that the Secretary's power to enforce the rights of lienholders be reenforced by a documentary assignment.

Where the Secretary has, by set-off or otherwise, recovered from the producer a sum equivalent to the producer's debt to the lienholder, an effective assignment can be obtained by a proper endorsement on the check by which the sum is turned over to the lienholder. The following is suggested as a suitable form for such an endorsement:

In consideration of the amount of this check, I do hereby assign, transfer and set over to Henry A. Wallace, Secretary of Agriculture, acting on behalf of the United States, all right, title, and interest that I may have to any claims arising out of promises made to me by Thomas Landlord in consideration of my consent to his entering into a contract with the said Henry A. Wallace for reduction of cotton acreage, known as the 1933 Cotton Benefit Contract

Serial Number of Contract

John Share-tenant.

Where the sum has not already been recovered, the assignment must give the Secretary a right of action without making him a mere attorney or trustee unable to set-off against amounts owed by him in another capacity to the producer, and must also not defeat the lienholder's ability to recover the sum himself. It would be undesirable, however, to permit the lienholder to give an effective discharge otherwise than in exchange for actual payment in money. The form of the assignment used for this purpose should also be appropriate for the assignment obtained under the regulations suggested in Section III above. The following is suggested as a suitable form for such an assignment.

I. In consideration of the promise set forth in paragraph II below, I, John Share-tenant, do hereby assign, transfer and set over to Henry A. Wallace, Secretary of Agriculture, acting on behalf of the United States, all right, title, and interest I may have arising out of promises made to me by Thomas Landlord in consideration of my consent to his entering into a contract with the said Henry A. Wallace for reduction of cotton acreage, known as the 1933 Cotton Benefit Contract.

II. Henry A. Wallace, Secretary of Agriculture, acting in behalf of the United States, promises that he will faithfully make every reasonable effort to obtain payment of the claims herein assigned and that he will pay John Share-tenant, in consideration of his assignment, a sum equivalent to ninety-nine per cent of the value of all payments he may receive by his efforts to collect the claims herein assigned. This assignment shall be defeated in whole or in part by the amount of any sum which John Share-tenant may in the future receive in lawful money of the United States in payment of the assigned claim.

III. This assignment shall be effective immediately without the signature of the said Henry A. Wallace.

Serial Number of Contract

John Share-tenant.

Francis M. Shea,
Chief, Opinion Section.
Office of the General Counsel.

No. 137

PROCEDURE WHEN BENEFIT PAYMENTS HAVE BEEN MADE
TO WRONG PAYEE

When the interested parties to a cotton benefit contract have requested that benefit payments be made jointly to the producer and to the lienholder, and the benefit check through a clerical error is made solely to the producer, if no amicable adjustment can be made, the Agricultural Adjustment Administration has authority to issue, and must issue, a new check covering the lienholder's interest in the payment.

The Administration has recourse against the producer to compel the return of the check, to stop the check in the hands of the payee, to collect the amount of the check, or to set off the amount of the check against any other debt owed to the producer.

The same procedure and remedies are indicated when a cotton option contract has been pledged in proper form and due notice given, and when through a clerical error, the option payment check has been made payable solely to the producer.

September 22, 1934.

MEMORANDUM TO MR. McCONNAUGHEY

You have requested my opinion on two questions relating to the procedure to be adopted where payments under the cotton contracts have been made to the wrong payees. These questions raise identical points of law, and I am, therefore, making this opinion applicable to both situations.

QUESTIONS

1. Where the interested parties to a cotton benefit contract have requested that benefit payments be made jointly to the producer and the lienholders, what should be the procedure of the Administration in the event that, through a clerical error, a benefit payment check is made solely to the producer?
2. Where a cotton option contract has been pledged in proper form and due notice given, what should be the procedure of the Administration in the event that, through a clerical error, an option payment check is made payable solely to the producer?

OPINION

It would be proper for the Administration to attempt to bring about an amicable settlement between the parties. The procedure suggested in the accompanying memoranda is entirely proper. If no amicable settlement can be reached, the Administration has authority to issue, and must issue, a new check covering the lienholder's interest in the payment. The Administration has recourse against the producer to compel the return of the check, to stop the check in his hands, to collect the amount of the check, or to set off one amount of the check against any other debt owed the producer.

DISCUSSION

Section 206 of Cotton Regulations, Series 1, provides that checks representing cotton benefits may be made payable to the producer and lienholder or lienholders, jointly, if request therefore be made in the offer. Where, pursuant to this permissive provision, the offer contains a term calling for payment by joint check, acceptance of the offer by the Secretary imposes on the Secretary a contractual duty to make payment in that manner and not otherwise.

Participation Trust Certificates under the cotton producers' pool are by their terms transferable. A transfer will be binding against the manager of the pool after notice shall have been given him on a form provided for the purpose, together with a specimen of the signature of the transferee, and the certificate surrendered to the manager. The cotton option contract itself provides that it shall be non-transferable (Form C5, paragraph 1), except that it may be pledged or used as collateral (Form C5, additional paragraph 2, authorized by Section 77 of the Agricultural Adjustment Act as modified by Section 221 of the National Industrial Recovery Act).

Both in the case of a cotton benefit contract requesting payment by joint check and in the case of a cotton option contract pledged in due form, the Agricultural Adjustment Administration is, therefore, under a contractual duty to the lienholder to make payment in the fashion requested. Amicable settlement will, of course, discharge this duty, operating as an accord and satisfaction. If no settlement can be reached, the administration must perform.

If the debt be considered as one to the producer and lienholder jointly, payment to the producer alone would discharge the debt. Nevertheless, it would amount to a breach of the contract for which the lienholder could recover damages to the amount of his share of the check. On the other hand, in the case of the cotton benefit contract, if the debt be considered as one to the producer and lienholder severally, payment made by check to the producer alone does not discharge the obligation. The Administration would then be under a duty to issue a check properly drawn payable to the lienholder and the producer jointly. But if the producer has improperly refused to return the check or to account for the proceeds, he will not be heard to object to direct payment of the lienholders by the Administration, and the Administration would, therefore, be authorized to pay directly to the lienholders the amount of their share of the payments under the contract. In any case, therefore, the Administration must pay the lienholder the amount of the lienholder's share.

Before making such payment, the Administration should require of the lienholder proof satisfactory to itself of the extent of his interest and of the extent to which that share remains unsatisfied. An affidavit by the lienholder would be adequate proof for this purpose. It is suggested that a letter be sent to the lienholder requesting this affidavit and calling to the attention of the lienholder the penal sanctions applicable to a false affidavit by which money is obtained from the Government. (Cr. Code Sec. 80) A letter should also be sent to the producer requesting affidavit to the same questions calling attention to the penal sanctions, and giving notice that failure to reply will operate to bar any later claim that the lienholder's outstanding interest in the option or benefit payments is less than that claimed in the proof submitted by the lienholder. While such proof does not constitute strict legal proof, it offers reasonable assurance of truth, and payments are subject to the review of the Secretary of Agriculture and the Secretary of the Treasury only. (Agricultural Adjustment Act, Sec. 10 (e)).

While the check remains in the hands of the producer, it may be stopped. This would be no protection against a bona fide purchaser for value, but after notice to the producer of the stopping of the check, a negotiation by him would constitute a fraud subject to penal sanction. Criminal Code Section 80 is in terms applicable to the situation. It is not entirely clear whether it would be interpreted as applicable by a court. I have found no decisions directly in point. The language of the cases, however, points to a broad rather than a narrow interpretation. The applicable portion of the section reads as follows:

"* * * whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim [i.e. any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder], or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof * * * shall knowingly and willfully falsify or conceal or cover up by any trick, scheme or device a material fact, or make or cause to be made any false or fraudulent statements or representations, * * * shall be fined not more than \$10,000 or imprisoned not more than ten years or both."

Where the check has not been negotiated to a bona fide purchaser for value, an action may be had to compel delivery for cancellation against the producer, his administrator, or executor, or holder, not in due course.

Where the producer remains available to legal process, an action may be had for the amount of the check paid over by the mistake of the Department to the knowledge of the producer, the producer being fully charged with notice of the purpose of the payment and of the proper beneficiaries. Where the producer has died, an action may be had against the administrator or executor. Where the producer has disappeared or is otherwise unavailable to legal process, the Administration is without remedy to recover the amount of the payment, except that it may set off one amount against any debt owed the producer. Lack of recourse, however, will not affect the Administration's obligation.

This action is brought upon the theory of a quasi-contractual obligation to account for money received through the mistake of the payer. The same facts would equally well give rise to a similar action by the lienholder for an accounting. The election between these two remedies, however, lies with the Administration, and if the Administration chooses to consider the check as not a discharge of its own contractual duty, which it clearly should do, the Administration alone will have the right to recover from the producer. This alternative is the preferable one because it avoids multiplicity of actions, simplifies administrative procedure, and avoids putting the Administration in the position of evading its contractual obligations.

Francis M. Shea,
Chief, Opinion Section;
Office of the General Counsel.

FURNISHING OF OFFICIAL INFORMATION BY MARKET
ADMINISTRATOR

The Market Administrator, under the License for Milk for Alameda County, California Sales Area, should, in response to a subpoena duces tecum issued by a court of competent jurisdiction, appear and produce records or information furnished to him pursuant to the terms of the license.

The Market Administrator should not voluntarily furnish such records and information as the Oakland City Health Department may request in aid of a prosecution for violations of an Oakland health license.

September 26, 1934.

MEMORANDUM TO MR. LAUTERBACH

You have asked me to consider the questions raised by the Market Administrator of the Alameda County, California Milk Sales Area, in the following telegram dated September 24, 1934:

"OAKLAND CITY HEALTH DEPARTMENT PLAN TO PROSECUTE WILLOWBROOK CREAMERY ON ALLEGED VIOLATION HEALTH ORDINANCE FOR BOOTLEG CREAM STOP ACTION GROWING OUT INVESTIGATIONS THIS OFFICE STOP CITY HEALTH CONTEMPLATING ASKING FOR OUR RECORDS TO ASCERTAIN SOURCE OF SUPPLY AND QUANTITY CREAM SALES LATTER INFORMATION SOUGHT TO PROVE WILLOWBROOK EVADING INSPECTION FEE STOP INFORMED CITY HEALTH OUR INFORMATION CONFIDENTIAL BUT CITY HEALTH MAY SUBPOENA ME AND RECORDS STOP SHOULD LIKE TO COOPERATE CITY HEALTH BUT DESIRE YOUR INSTRUCTIONS STOP IF YOU AGREE ADVISABLE TO GIVE CITY HEALTH SPECIFIC INFORMATION SUGGEST IT BE DONE BY SUBPOENA AND NOT VOLUNTARILY"

QUESTIONS

1. May the Milk Market Administrator furnish the information requested upon an award of a subpoena duces tecum by a court of competent jurisdiction, commanding him to appear and produce certain records in his possession?
2. May the Milk Market Administrator voluntarily furnish such information as the Oakland City Health Department may require in aid of prosecution for violation of an Oakland health ordinance?

OPINION

Upon examination of the License for Milk, Alameda County, California Sales Area, I am of the opinion that the first question must be answered in the affirmative; the second, in the negative.

DISCUSSION

Section (d), paragraph 4, article II of the License for Milk, Alameda County, California Sales Area (License Series - License No. 33) is applicable to distributors of milk in Oakland, California (paragraph C, article I). It reads:

"All information furnished the Secretary, pursuant to this paragraph, shall remain confidential in accordance with the applicable General Regulations, Agricultural Adjustment Administration."

The applicable General Regulation is article II, section 200 of General Regulations, Series 5, reading:

"Any officer, employee, agent, or expert of the Department who shall wilfully divulge or make known in any manner any confidential information regarding the business of any person which may come to the knowledge of such officer, employee, agent, or expert through an examination or inspection of the books and records of such person or in any other manner, except to other officers, employees, agents, or experts of the Department who may be entitled to have such knowledge in the regular course of their official duties, or except upon lawful demand made by the President, by either House of Congress or any committee thereof, or except as he may be required by subpoena or other legal process to testify as to the same in a court of competent jurisdiction or except as he may be required to testify in any hearing, authorized by the Act, or by Regulations issued pursuant thereto, for the suspension or revocation of the license of the person from whom such information was obtained or by whom it was furnished, shall be liable to a penalty to be imposed by the Secretary of not less than \$25.00 nor more than \$100.00 for each offense."

(Underlining supplied)

It is, therefore, clear that the Milk Market Administrator may divulge such information as a court of competent jurisdiction may demand by subpoena duces tecum. By a "court of competent jurisdiction" is meant a court empowered to award a subpoena duces tecum or other legal process in the course of litigation over which it has general powers of adjudication.

I am of the opinion, however, that the Milk Market Administrator is not empowered to voluntarily divulge confidential information obtained by virtue of the terms of the Milk License to an administrative department of a municipality; although contemplated prosecution for violation of municipal ordinances has "grown out of investigations" of the Milk Market Administrator's office. The Market Administrator acts in no official capacity in aiding prosecution of violations of municipal health ordinances. As a person having special knowledge of violation of municipal penal statutes, he may feel it his duty to cooperate in assisting prosecution of violators. His cooperation, however, is not in his official capacity; but in a private one. The License for Milk, Alameda County, California, Sales Area, incorporates by reference the appropriate General Regulation. The General Regulation, it will be noted, enumerates specific conditions under which confidential information may be divulged. As stated in Mem. Op. Sec. No. 108 "to be within the terms of the license any divulging of information beyond these limits must be brought within the exceptions specified." I am in accord as to the applicability of the proposition stated to the instant case.

Francis M. Shea,
Chief, Opinion Section,
Office of the General Counsel.

ABROGATION OF CONTRACTS BY 1934 PHILIP-
~~PINE~~
PINE SUGAR ALLOTMENT

Pre-existing contracts for future delivery in the United States of sugar from the Philippines are abrogated when in excess of allotments made by the Secretary under Section 8a(1) (A) (i) of the Agricultural Adjustment Act, as amended, restricting the shipment of sugar to the United States from the Philippines.

Opinion Section Memorandum No. 196
Dated September 26, 1934.

September 26, 1934

MEMORANDUM TO MR. WIGHTMAN

I submit the following reply to the question raised in your memorandum of May 1 re the validity of pre-existing contracts for the delivery of sugar in the face of the allotments contemplated under the Jones-Costigan Sugar Act.

QUESTION

H.R. 8861, hereinafter referred to as the Sugar Act, provides, among other things, for the limitation of shipments to the United States from the Philippine Islands for the calendar year 1934. The Act became effective May 10, 1934, and, as of that date, 1934 shipments of sugar already in the United States and on their way from the Philippines were approximately equal to the quota set upon shipments from the Philippines (1,015,000 short tons raw value sugar). Of the 200,000 or 300,000 tons of sugar still available in the Philippines, a considerable amount has been sold for delivery into the United States in June, July and August. In many individual cases contracts for the delivery of sugar may exceed the allotment granted by the Secretary of Agriculture pursuant to the Sugar Act.

Are such future delivery contracts validly abrogated by allotments made under Section 8a (1) (A) (i), forbidding processors, handlers and others "from transporting to, receiving in, processing or marketing in, continental United States," sugar in excess of the individual allotments set up by the Act?

ANSWER

Contracts for the delivery of sugar of the type above-mentioned are to be considered abrogated where in excess of the allotments made under the Sugar Act, restricting the shipment of sugar to the United States from the Philippines.

DISCUSSION

The section of the Costigan-Jones Sugar Act which allows the Secretary to forbid imports of sugar from the Philippine Islands reads:

"Sec. 8a (1) Having due regard to the welfare of domestic producers and to the protection of domestic consumers and to a just relation between the prices received by domestic producers and the prices paid by domestic consumers, the Secretary of Agriculture may, in order to effectuate the declared policy of this Act, from time to time, by orders or regulations--

"(A)(i) Forbid processors, handlers of sugar, and others from importing sugar into continental United States for consumption, or which shall be consumed, therein, and/or from transporting to, receiving in, processing or marketing in, continental United States, and/or from processing in any area to which the provisions of this title with respect to sugar beets and sugarcane may be made applicable, for consumption in continental United States, sugar from the Virgin Islands, the Philippine Islands, the Canal Zone, American Samoa, the island of Guam, and from foreign countries, including Cuba, respectively, in excess of quotas fixed by the Secretary of Agriculture, for any calendar year, based on average quantities therefrom brought into or imported into continental United States for consumption, or which was actually consumed, therein, during such three years, respectively, in the years 1925-1933, inclusive, as the Secretary of Agriculture may, from time to time, determine to be the most representative respective three years, adjusted, together with the quotas established pursuant to paragraph (ii), (in such manner as the Secretary shall determine) to the remainder of the total estimated consumption requirements of sugar for continental United States, determined pursuant to subsection (2) of this section, after deducting therefrom the quotas for continental United States, provided for by paragraph (B) of this subsection: Provided, however," etc.

The question raised is whether the ban against imports is valid in the face of pre-existing contracts calling for delivery of sugar to refiners and others within the United States. It must be concluded that it is. Contracts entered into which involve a transaction with respect to interstate commerce are deemed to be entered into with the realization that they are subject to governmental regulation. Addystone Pipe & Steel Co. v. U. S., 175 U.S. 211; Armour Packing Co. v. U. S., 209 U.S. 56 (1908); Elliott Machine Co. v. Center, 227 Fed. 124 (W.D.

Mich. S.D. 1915); U. S. v. United Shoe Machinery Co., 264 Fed. 138 (E.D. Mo. 1920); W.M. Carter Planing Mill Co. v. New Orleans, M. & C. R. Co., 112 Miss. 148, 72 So. 884 (1916). Another way of stating this presumption is that the exercise of the interstate commerce power cannot be fettered by pre-existing contracts. Louisville & Nashville R. Co. v. Mottley, 219 U. S. 467 (1911); Philadelphia, Baltimore, Washington R. R. v. Schubert, 224 U. S. 603 (1912); Lewis Leonhardt & Co. v. Southern Ry. Co., 217 Fed. 321 (C.C.A. 6th 1914). To the extent that the Sugar Act is an exercise of Congressional powers in addition to the interstate commerce power, the case for abrogating prior contracts is pro tanto strengthened.

The liability of the sugar industry to governmental regulation is enhanced by the conceded fact that the sugar industry was confronted with a crisis. See Exhibits Nos. 4, 5, 6, 8, 35, 78, in Appendix to Memorandum to Mr. Shea, dated May 18, 1934. An emergency may extend the scope of the power to regulate, and even supersede, prior contracts beyond that which would exist under normal circumstances. See Legal Tender Cases, 79 U. S. 457 (1871); Bleck v. Hirsh, 256 U. S. 135 (1921); Marcus Brown Holding Co., Inc. v. Feldman, 256 U. S. 170 (1921); Home Building & Loan Association v. Blaisdell, 290 U. S. 398 (1934); Highland v. Russell Car & Snow Plow Co., 135 Atl. 759 (Pa. 1927).

Any argument relying on the Act's interference with vested interests, which may be raised in answer to the argument that the critical state of the sugar industry necessitated congressional legislation, can to some measure be met by the undoubted fact that the whole sugar industry was aware of the various preparations that had, first administratively and later legislatively, been entertained for the regulation of the sugar industry. The sugar stabilization agreement, which incorporated many of the features of the present Act, was under discussion during the summer of 1933 and hearings had been held on it in August of that year. Prior even to that, the Agricultural Adjustment Act, passed on May 12, 1933, provided a mechanism in its license sections (see Section 8 (3)) whereby it was rendered possible that the processors and handlers of any agricultural commodity might be subjected to drastic restrictions which could imoede or render totally impossible the performance of pre-existing contracts.

Even if regulation under the license powers conferred on the Secretary of Agriculture by Section 8 (3) of the Agricultural Adjustment Act could not have been applied to shippers receiving sugar from the Philippine Islands, the possibilities of tariff legislation which might achieve a result similar to that which is sought to be attained under the Act must have been apparent to all dealers in sugar. (Cf. Opinion No. 43) The Sugar Act itself was the fruition of months of planning, in the course of which careful consideration was given to it, both in the committee room and on the floor of Congress. It was introduced on March 28, 1934, and occupied the attention of the House Committee of Agriculture February 19-23, 1934. The various interests which would be affected by a limitation on imports and a subsequent

cutting down of the contracts entered into in connection therewith, were well represented at the Committee hearings and were presumably in constant touch with the program of legislative deliberation on the subject. It is unconceivable that any responsible sugar shipper in the Philippines or sugar importer in the United States could have failed, either through trade journals or his association, to know what the general tenor of the legislative intent was. It is, therefore, a tenable assumption that, if they entered into an excessive number of contracts for future delivery, they did so despite a realization on their part that Congress contemplated cutting down deliveries of sugar in the future. It may even be argued that they were actuated by the idea of getting as many contracts in "under the wire" as was possible before the legislative ban issued. Such a non-cooperative attitude is highly to be condemned in times of stress such as have provoked the Agricultural Adjustment Act and the Costigan-Jones Sugar Bill, nor should cooperators be penalized for their cooperation. In fact, the fear that anticipation of legislation might lead those affected thereby to enter into contracts contrary in effect to the provisions of such legislation is one of the reasons assigned by the Supreme Court for allowing legislation to supersede prior contracts. See Philadelphia, Baltimore, Washington R. R. v. Schubert, 224 U. S. 603 (1912). Other cases similar to the Schubert case feel that notice of the fact that a law is to go into effect is a legally immaterial factor. See T. Dingley v. City of Bath, 90 Atl. 972 (Me. 1914); Massillon Savings & Loan Co. v. Imperial Finance Co., 114 Ohio St. 523, 151 N.E. 645 (1926).

If the sugar delivery contract were made between the effective date of the Act and the fixing of import quotas, such a contract would even more strongly be deemed to be superseded by the law. This is analogous to the case where a commission exists which possesses the power to fix rates but has not yet taken action. See Union Dry Goods Co. v. Georgia Public Service Corp., 248 U. S. 372, 374 (1919); Suburban Water Co. v. Borough of Oakmont, 268 Pa. 243, 110 Atl. 778 (1920). In such a case the contracting parties enter into the contract with actual knowledge that the terms of their contract are subject to legislative regulation, and the "vested interests" argument, which might possibly be available to them as to contracts entered into prior to the passage of the Act, cannot be adduced in their favor. It should be noted that the effective date of the Act is the date that it became law by virtue of the President's signature and not the date that it passed Congress. See Lewis' Sutherland Statutory Construction (2 ed. 1904) § 172. This paragraph accordingly has reference only to contracts made subsequently to May 10 and prior to the fixing of import quotas.

It is an established rule of law that where contracts are made totally impossible of performance by act of the legislature (or by act of God), they are thereby terminated. Halloran v. Jacob Schmidt Brewing Co., 162 N. W. 1082, Minn. (1917); Greil Bros. Co. v. Mabson.

179 Ala. 44, 60 So 876 (1912; rehearing denied 1913); Brunswick-Balke-Collender Co. v. Seattle Brewing & Malting Co., 98 Wash. 12, 167 Pac. 57 (1917); Heart v. East Tennessee Brewing Co., 121 Tenn. 69, 113 S. W. 364 (1908); Kahn v. Wilhelm, 118 Ark. 239, 177 S. W. 403 (1915); Hooper v. Mueller, 158 Mich. 595, 123 N. W. 24 (1909); The Stratford, Inc. v. Seattle Brewing & Malting Co., 162 Pac. 31 (1916); Doherty v. Eckstein Brewing Company, 196 App. Div. 708, 187 N. Y. Supp. 633, 634 (1st Dept. 1921); Houston Ice Co. v. Keenan, 99 Tex. 79, 88 S. W. 197, 198 (1905). But cf. Hecht v. Acme Coal Co., 19 Wyo. 18, 113 Pac. 799 (1911); J.J. Goodrum Tobacco Co. v. Potts-Thompson Liquor Co., 133 Ga. 776, 66 S. E. 1081 (1910), reported in Potts-Thompson Liquor Co. v. Capital City Tobacco Co., 174 S. E. 279, 282 (Ga. 1912); and Standard Brewing Co. v. Weil, 129 Md. 487, 99 Atl. 661 (1916). Where their performance is merely made more burdensome or where conditions are by force of law read into the contracts which are not destructive of those contracts, contracts sometimes continue in force with the altered effect which is given them by the new law. The line that has to be drawn in these cases is not a clearly defined one. Changing the price or rate term of a contract, which certainly strikes very closely at the essence of a contract, has been held not to have the effect of abrogating such a contract. Where a contract is merely rendered impossible of performance for a certain period of time and can thereafter resume effective operation, it is merely deemed suspended for the first mentioned period of time. School District No. 16 of Sherman County v. Howard, 5 Neb. Unoff. 340, 98 N. W. 666, (1904); Colonial Trust Co. v. Bodok, 155 Atl. 799 (N.J. 1931). Cf. Board of Education of the City of Hugo v. Couch, 162 Pac. 485 (Okla. 1917). Furthermore, severability in a contract may mean that part of it can be performed and part cannot; it is almost the equivalent of partial performance. See Massillon Savings & Loan Co. v. Imperial Finance Co., cited *supra*; Suburban Water Co. v. Borough of Oakmont, cited *supra*.

In the situation presented for consideration in this memorandum the term of the contract that would have to be altered in order to allow of performance under the law, would be a change of the delivery date from June, July and August 1934 to some period subsequent to January 1, 1935. The contract which an allotment under the Sugar Act would interfere with is an executory contract on both sides. It is not a contract which has been executed on either side, in which latter case different legal considerations might be expected to prevail. Cf. Louisville & Nashville R. R. Co. v. Crowe, 160 S. W. 759 (Ky. 1913); American Mercantile Exchange Co. v. Blunt, 102 Mo. 126, 66 Atl. 212. Although the operation on pre-existing contracts of an embargo (which is in effect what Section 8a (1)(A)(i) of the Sugar Act accomplishes) has always been familiar to the Courts, the number of adjudicated decisions thereon are not many. It should, however, be noted that the Legal Tender Cases, 79 U. S. 467 (1871), refer very frequently to embargoes as an illustration of Congressional action destroying prior contracts. Constant reference is

made in the reports to the case of Baylies v. Fettyplace, 7 Mass. 325 (1811), which involved an almost completely executed contract. The plaintiffs in that case had sold the defendants various quantities of sugar. Payment was to be made in three installments, two cash installments and a third installment consisting of certificates of debentures of the United States to the value of approximately \$2,000. The cash installments had been paid, but as to the certificates of debenture, which were issued by officers of the Customs upon the exportation of such sugars from the United States, defendants pleaded that, despite the fact that they had done everything requisite to export the sugar and to procure such certificates, same could not be obtained because of the passage of the Embargo Act of 1807, which continued unrepealed and in full force at the time of the commencement of the action. The plaintiffs in their replication pleaded that the defendants had accepted the sugars purchased subsequent to the levying of the embargo, but this was held immaterial by the court. Sewall, J. said,

"An embargo, considered as a temporary suspension of commerce, does not operate a dissolution of any mercantile contract. (4) (b)" (at 331)

He then conceded the possibility, after allowing a reasonable time to elapse for procuring the debentures, of indemnification otherwise:-

"although the delivery of the specific debentures, to be obtained on the exportation of the sugars, became, by that act, impracticable, yet this did not disable the defendants from paying, or the plaintiffs from recovering, the discount allowed upon the price of the sugars, or a reasonable indemnification and equivalent for the debentures, engaged as the consideration of that discount." (at 332)

Evidently, by Sewall, J. the Embargo Act was considered as working a temporary suspension; but Sedgwick, J. appears to incline to the view that the whole contract had been rendered illegal. This, however, is only matter of inference and was not necessary to the actual holding of the case, which arose on demurrer to the plaintiff's replication.

In view of the diversified fluctuations of the sugar market, labor conditions, financial credit, etc., which a lapse of five or seven months might entail, I should say that the alteration of the date of delivery term of the contract would be as material as to effectually deprive the parties on both sides of what they had bargained for. It is therefore possible to render the opinion that contracts for the future delivery of sugar are abrogated where the law renders impossible such delivery until a period of half year later than the date stipulated for such delivery in the contract without even considering the collateral consequences which the

specific change may have. For instance, in the standard Philippines Raw Sugar Contract the date of payment for the sugar is ten days from average date of discharge of the sugar from the vessel. There also may be changes in import regulations and tariff rates which might render performance on either side more onerous. Subsidiary considerations such as these would only serve to fortify the conclusions above set forth.

Francis M. Shea,
Chief, Opinion Section,
Office of the General Counsel.

CERTIFICATE OF COMPLIANCE WITH MILK LICENSE

A certificate of compliance with a milk license issued under Section 8(3) of the Agricultural Adjustment Act, unless issued uniformly, may, as to those to whom it has not been issued, furnish a cause of action based upon the discrimination. In view of the legal complications to which the practice may give rise, extreme caution in determining to make use of such certificates is advised.

September 26, 1934

MEMORANDUM TO MR. LAUTERBACH
CHIEF, DAIRY SECTION

You have asked my opinion concerning the following certificate proposed to be issued by the Milk Market Administrator for the Detroit Sales Area, to milk distributors subject to the license:

"Having complied with the terms of Detroit Sales Area U.S. License for Milk, in that reports required have been made and satisfactory evidence furnished of their ability to pay for all Milk purchased of Producers, this notice as evidence of this, has been issued to the

(Name of Station and Distributor operating same)

Dated: _____

E. M. Bailey
MILK MARKET ADMINISTRATOR
DETROIT SALES AREA"

OPINION

Such certificate, if issued, must go to all distributors in the Detroit Sales Area subject to the Milk License except those whose license has been suspended, revoked, or challenged on the basis of sufficient evidence of noncompliance submitted to the Secretary of Agriculture. The Agricultural Adjustment Act (Art. 8, Sec. 3) has empowered the Secretary of Agriculture, after due notice and opportunity for hearing, to suspend or revoke the license as to any distributor. The Milk License for the Detroit Sales Area does not confer upon the Market Administrator any discretionary power to affect the status of licensees. A certificate of compliance, unless issued uniformly, may, as to those to whom it has not been issued, give actionable ground and open avenues of litigation. To obviate such possibility, the language of the certificate ought to be modified in substantial accord with suggestions herein made.

DISCUSSION

Unless carefully restricted as to language and unrestricted (with certain clearly indicated exceptions) as to distribution among licensees, the certificate in its present form may well give rise to legal complications and litigation disproportionate to its administrative merit. Obviously, inadvertent opening of channels of litigation is not to be encouraged. Necessarily involved in the issuance of a certificate of compliance to distributors are the possible questions of refusal to issue the certificate to certain distributors, removal of certificate issued in the event of subsequent contingencies, property rights in the certificate because of its economic value in inducing dealings with the distributor, economic boycott, and the mechanism of suspension and revocation of license already established by the Secretary of Agriculture pursuant to the Agricultural Adjustment Act.

The Milk License for the Detroit Sales Area is an extension of the terms of the Agricultural Adjustment Act effectuating a license for a specific commodity in a specific area. In construing the terms of the License, it is evident that the language of the License must be read in conjunction with the Agricultural Adjustment Act itself. The Act specifies that the Secretary of Agriculture, after due notice and opportunity for hearing, may revoke or suspend any license for violation of its terms or conditions. The fair import of this language is that the Secretary of Agriculture has the power to determine whether there is compliance with the terms of any license. The License specifically provides that delegation of powers and duties are not in derogation of any powers that the Secretary of Agriculture has not delegated. Nowhere in the License is there any mention of suspension or revocation of the License, and patently no mention of such power amongst those delegated to the Milk Market Administrator. It must, therefore, be concluded that the Secretary of Agriculture reserved to himself all powers concerning compliance with the terms of the License and action to be taken in the event of non-compliance.

The proposed certificate of compliance issued by the Milk Market Administrator must not be so drafted as to indicate a commitment by the Secretary of Agriculture that a specific distributor has complied. While the Secretary of Agriculture may, because of his powers of suspension and revocation, issue a certificate, the Milk Market Administrator, having no power in connection with suspension or revocation of the License, may not do so.

The avowed purpose of the proposed certificate is to assure producers of milk that the distributors are able to pay for the product. A possible connotation of the issuance of a certificate is that distributors who do not receive a certificate of compliance are not able to pay for the producer's product. The certificate, therefore, if issued to some distributors and kept from others, would have a demonstrable economic value. Conceivably, producers may determine not to deal with

a distributor who does not display a certificate. Substantial legal questions as to due process of law and deprivation of property rights, may follow. Unless opportunity for hearing is given to distributors who do not receive a certificate of compliance, the courts may well intervene. A reading of the statutory sections cited above demonstrates that the Milk Market Administrator has no discretion in matters of suspension or revocation of licenses, or conferring or removing the benefits of licenses. Were the Milk Market Administrator to refuse to issue a certificate of compliance to a licensee, such licensee might well be advised to seek judicial relief by writ of mandamus. See, in this connection, American School of Magnetic Healing v. McAnnulty, 187 U.S. 108, 110, where the Court said:

"The acts of all officers must be justified by some law and in case an official violates the law to the injury of an individual, the courts generally have jurisdiction to grant relief * * * otherwise, the individual is left to the absolutely controlled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual."

A further source of litigation may be a writ of injunction to restrain the removal of a certificate of compliance by the Milk Market Administrator once he has issued it. This may arise on ordinary principles of equity jurisprudence pertaining to property rights and deprivation without due process of law. As to questions of property and property rights that may arise, see People v. Wilson, 179 Appellate Division 416, 166 N.Y.S. 211, a case bearing on a milk license issued pursuant to the agricultural law of the State of New York. United States v. McFarland, 28 App. (D.C.) 552, held that partial or complete revocation of a license could not be exercised arbitrarily without cause unless so provided in the statute. See Doyle v. Continental Insurance Co., 94 U.S. 535, 24 L. Ed. 148; Manchester Fire Insurance Co. v. Herriott, 91 Fed. 711.

It is submitted that if the Milk Market Administrator determines as an administrative measure to issue the proposed certificates, they should be distributed to all milk distributors in the Detroit Sales Area, subject to the terms and conditions of the Milk License. If the Secretary of Agriculture has suspended or revoked a license in accord with his powers and under the conditions of the Agricultural Adjustment Act, such licensees may clearly be excepted from the uniform distribution. Furthermore, if the Secretary of Agriculture feels that sufficient evidence of noncompliance has been submitted to him, he may, as a necessary implication of his exclusive power to revoke or suspend, after notice and hearing, withdraw the certificate. The Milk Market Administrator, himself, under the terms of the Milk License, has no discretion as to who shall or who shall not receive the proposed certificate.

It is suggested, in furtherance of the analysis herein con-

tained and in consideration of the results that may ensue from an interpretation that a certificate is a finding of compliance or noncompliance, that the language of the proposed certificate be modified to read substantially as follows:

"This notice issued to the _____
evidencethat the aforesaid is governed by and
operating under the terms of the United States
License for Milk, Detroit Sales Area, including
its provisions requiring reports to be made
and satisfactory evidence to be furnished of
ability to pay for all milk purchased of
producers.

Dated: _____

E. M. Bailey
MILK MARKET ADMINISTRATOR
DETROIT SALES AREA"

Unless considerable advantages are to be reasonably expected from the use of such certificates, the legal complications to which the practice may give rise, even where the safeguards suggested above are adopted, suggest that extreme caution should be observed in determining to make use of them.

Francis M. Shea.
Chief, Opinion Section,
Office of the General Counsel.

FORFEITURE OF SUGAR ALLOTMENTS

The Secretary is not authorized to provide, in a marketing agreement under the Agricultural Adjustment Act concerning sugar produced in the Philippine Islands, that a violation of any of the terms and provisions of the Agreement shall entail the forfeiture of the sugar allotment of the contracting party.

A license issued under Section 8(3) of the Act, however, may provide for a forfeiture of the allotment in case of a revocation of the license.

In either case will the result be different if the allotments are represented by transferable allotment certificates.

September 26, 1934

MEMORANDUM TO MR. PRESSMAN

Pursuant to your request dated September 23, 1934, I submit the following:

QUESTION

- (a) Can the Secretary of Agriculture provide in a marketing agreement concerning sugar produced in the Philippine Islands that the violation of any of the terms and provisions of the agreement shall entail the forfeiture of the tonnage allotment of the contracting party?
- (b) Can the same purpose be accomplished by a provision in a license for forfeiture of the tonnage allotment in case of revocation of the license?
- (c) Is the result in either case different if the allotment be represented by transferable allotment certificates?

OPINION

The clause in the marketing agreement would be invalid. The provision referred to above could not possibly be construed as a stipulation for liquidated damages and is, therefore, unenforceable on contract principles. On the other hand, the Agricultural Adjustment Act contains no authorization to impose penal sanctions for the violation of marketing agreements. A provision to the same effect in a license could validly accomplish this purpose, inasmuch as the Secretary of Agriculture may discriminate against non-licensees in making sugar allotments. The result will in neither case be different if the allotments are represented by transferable certificates.

DISCUSSION

The question raised is discussed with particular reference to the following clause in a proposed marketing agreement for sugar produced in the Philippine Islands:

"Any contracting party who shall willfully violate any of the terms and provisions of this Agreement shall, after hearing before the Secretary or his representative specially designated for the purpose, be subject in addition to other penalties provided by law to forfeiture of his tonnage allotment for deliveries of sugar in continental United States, in such manner and to such extent as the Secretary shall prescribe."

While the case of obtaining specific performance (see Agricultural Adjustment Act, Sec. 2a(6)) may be a countervailing consideration, yet in view of the difficulty of ascertaining actual damages to the Secretary of Agriculture by the breach of marketing agreements, courts might be expected to be extremely liberal in construing stipulations as providing for liquidated damages. Despite this liberalizing tendency, however, the fact that the proposed provision is thoroughly fraught with indicia of an arbitrary penalty makes inescapable the conclusion that it is invalid. Among those indicia are:

- (1) The forfeiture has no reasonable connection with damages caused.
- (2) The forfeiture is imposed, in the same extent, upon any breach, irrespective of the seriousness or the extent of the violation of the marketing agreement.
- (3) The forfeiture is of no pecuniary benefit to one of the parties who seeks the imposition.
- (4) The very procedure for its enforcement has all the earmarks of the imposition of an administrative penalty.

It is elementary law that forfeitures for breach of contract will not be enforced. The applicable principles and authorities are discussed in extenso in Sun Printing & Publishing Assn. v. Moore, 183 U.S. 342 (1902), especially at page 360, et seq.

The mere fact that general contract principles do not render enforceable a provision of the type contemplated is not conclusive upon its invalidity, in view of the seemingly plenary authority over allotments which the Secretary of Agriculture is granted by Section 8a(1)(A)(i). However, the power granted is probably subject to the implied limitation that it must be exercised reasonably, and discrimination against non-signers of marketing agreements or violators of marketing agreements could only tenuously be argued to be reasonable. Indeed, the settled law to the effect that forfeitures are unenforceable would strongly militate against an argument that such discrimination is reasonable. In addition it may be argued that the numerous penalties provided for by the Agricultural Adjustment Act are both sufficient and exclusive provisions for its enforcement.

Assuming, however, that a license be imposed which is coextensive with the proposed marketing agreement or that violation of the marketing agreement be made a violation of the license, revocation of the allotment could be made one of the incidents of the revocation of the license. The grant of a license and the grant of an allotment are both, in effect, a grant of the privilege to do business. Obviously, if a license be required, an allotment to a non-licensee would not entitle him to engage in the handling of sugar. It, therefore, could not be argued that it would be unreasonable for the Secretary of Agriculture to make allotments solely to licensees. By the very terms of Section 8a(1)(A)(i) the Secretary of Agriculture may " * * * readjust any such allotment, from time to time, * * *". The recall of an allotment originally made, after the revocation of a license, would appear to be a reasonable exercise of this power to readjust.

The use of transferable certificates to represent the allotments will not affect either of the foregoing conclusions. Even if it be concluded that an allotment embodied in a certificate would partake more of the nature of property than one which exists merely in the form of a regulation, the indicia of a penalty will still be present. On the other hand, there is no reason why a processor whose license has been revoked may not be compelled under the license to surrender his certificate. The extent to which the certificates can be made negotiable in character is, however, a matter of serious question. It may be doubted whether the Secretary can divest himself of the power to make adjustments in outstanding allotments. However, the proposed certificates can certainly, by appropriate phrasing, be made subject to such subsequent adjustment.

Francis M. Shea,
Chief, Opinion Section,
Office of the General Counsel.

FUNDS AVAILABLE FOR SOIL SURVEY OF
PUERTO RICO

Funds appropriated by Sections 12(a) and (b) of the Agricultural Adjustment Act are available to meet administrative expenses incurred in connection with a soil survey of Puerto Rico, made in pursuance of an agreement between the Puerto Rican Policy Commission and the Bureau of Chemistry and Soils of the United States Department of Agriculture, only if such survey can be shown to have a reasonable relation to one or more of the functions authorized by the Act.

The proceeds of taxes collected from the processing of sugar beets or sugarcane in Puerto Rico, or upon the processing in the United States of sugar produced in that area, may, by Presidential proclamation, be made available for such purpose.

September 28, 1934

MEMORANDUM TO MR. PRESSMAN

In reply to your request dated September 24, 1934, I render my opinion upon the following:

QUESTION

Are the sums appropriated under Sections 12(a) and 12(b) of the Agricultural Adjustment Act available in order to meet administrative expenses incurred in connection with a soil survey of Puerto Rico made in pursuance of an agreement between the Puerto Rican Policy Commission and the Bureau of Chemistry and Soils of the United States Department of Agriculture?

ANSWER

These sums are available for such purposes only if the soil survey can be shown to have a reasonable relation to one or more of the functions authorized by Title I of the Agricultural Adjustment Act. However, the proceeds of taxes collected from the processing of sugar beets or sugarcane in Puerto Rico, or upon the processing in the United States of sugar produced in that area, clearly may, by Presidential Proclamation, be made available for these purposes.

OPINION

Pursuant to an agreement entered into May 23, 1934, between the Puerto Rican Policy Commission and the Bureau of Chemistry and Soils of the United States Department of Agriculture a soil survey of the Island of Puerto Rico is being made. Under that agreement the Puerto Rican Commission has agreed to finance the project to an amount not to exceed Thirty-Five Thousand (\$35,000.) Dollars, and your question is directed to a determination of what funds are available in order to meet administrative expenses over and above this figure.

It is stated in your request for an opinion that, "It is understood that there are not available processing taxes from sugar to use for this survey." In case this understanding is without foundation or in case the circumstances are altered, it is pertinent to note that, by virtue of Section 15(f) of the Agricultural Adjustment Act, the proceeds of taxes collected upon the processing of sugar beets or sugarcane in Puerto Rico, or upon the processing in the United States of sugar produced in that area, might be made available for the expenses of the survey should the President so proclaim. Section 15(f) provides in part that:

"The President, in his discretion, is authorized by proclamation to decree that all or part of the taxes collected from the processing of sugar beets or sugarcane in Puerto Rico * * * and/or upon the processing in continental United States of sugar produced in, or coming from, said areas, shall not be covered into the general fund of the Treasury of the United States but shall be held as a separate fund, in the name of the respective area to which related, to be used and expended for the benefit of agriculture * * * in such areas, respectively, as the Secretary of Agriculture, with the approval of the President, shall direct."

It is my opinion that the phrase "for the benefit of agriculture * * * in such areas" is sufficiently broad to justify the use of these proceeds to meet the administrative expenses of a soil survey of Puerto Rico.

If these proceeds cannot for some reason be made available, there remains the question whether any funds appropriated under Section 12(a) or Section 12(b) of the Agricultural Adjustment Act may be used. The theory of your request is that the availability of these funds for "administrative expenses" may justify their use in connection with the soil survey. The sum of Three Hundred Million (\$300,000,000.) Dollars appropriated under Section 12(a) of the Agricultural Adjustment Act, as amended, is available only for administrative expenses under Title I of the Agricultural Adjustment Act. The proceeds of taxes appropriated under Section 12(b) are available for administrative expenses only under Part 2 of Title I of the Act.

In an opinion rendered to Mr. Ward M. Buckles, Director of Finance, by this Section under date of July 11, 1934 (Opinion No. 116), it was stated that, "The mere fact that the functions of the Land Policy Section assist, directly or indirectly, the purposes of the Agricultural Adjustment Administration is not alone sufficient to justify payment of its expenses of the funds in question, for, as has been indicated, the expenses must relate to functions authorized by the Agricultural Adjustment Act."

Upon the basis of such information as your request and the agreement disclose, I am unable to determine whether such a survey can be conducted under any of the functions of Title I of the Agricultural Adjustment Act. It is difficult to see what relation such a survey can have to any of the purposes set forth in Section 8 of the Act. The "production adjustments" which the Secretary is authorized to finance under Section 12(a) relate only to the dairy and beef cattle industries. It is possible that the survey may be shown to have some relation to such adjustments, or to a program for the expansion of markets under Section 12(b).

Failing such a showing, I cannot advise you that the funds in question are available in order to meet the expenses of the projected soil survey of the Island of Puerto Rico.

Francis M. Shea,
Chief, Opinion Section,
Office of the General Counsel.

Appendix 1

A P P E N D I X

Selected Relevant Opinions of the Attorney General

and

Ruling of the Commissioner of Internal Revenue, dated September 18, 1934.

No. A-1

PROPRIETY OF APPOINTMENT UNDER THE
AGRICULTURAL ADJUSTMENT ACT

Mr. (A), a partner in a private banking firm which engages in the buying and selling on the market of cotton and cotton futures, may not be appointed as an adviser to the Administrator of the Agricultural Adjustment Act and continue as a partner in the firm, without a violation of Section 10(g) of the Agricultural Adjustment Act.

Opinion of the Attorney General
Dated May 19, 1933.

OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES

WHETHER CERTAIN APPOINTMENT IS IN VIOLATION OF
AGRICULTURAL ADJUSTMENT ACT OF MAY 12, 1933.

May 19, 1933.

My Dear Mr. Secretary:

I have the honor to refer to your letter of May 18, 1933, in which you state that Mr. George Peek, Administrator of the Agricultural Adjustment Administration, wishes to appoint Mr. (A) to act as one of his advisers, and you desire to be advised whether his appointment would be in violation of Section 10(g) of the so-called Agricultural Adjustment Act of May 12, 1933 (Public No. 10), which provides:

"No person shall, while acting in any official capacity in the administration of this title, speculate, directly or indirectly, in any agricultural commodity or product thereof, to which this title applies, or in contracts relating thereto, or in the stock or membership interests of any association or corporation engaged in handling, processing, or disposing of any such commodity or product. Any person violating this subsection shall upon conviction thereof be fined not more than \$10,000 or imprisoned not more than two years, or both."

In this connection, you state:

"Mr. (A) is a partner in the private banking firm of (B). This partnership includes in its activities the buying and selling on the market of cotton and cotton futures, as well as all other commodities dealt in on exchanges. It also buys and sells in the market, on the exchanges, shares of stock in corporations owning chain stores, and department stores, or otherwise engaged in handling or disposing of agricultural commodities and products thereof. The same partnership also acts as manager for the (C) Corporation, an investment trust, which buys and sells commodities including agricultural commodities, and shares of stock of corporations of the character above indicated; the fees received for such management are based upon the profits of the (C) Corporation.

"It is proposed that Mr. (A) be designated to act in connection with the administration of the so-called Agricultural Adjustment Act, approved May 12, 1933. Mr. (A) would be appointed by Mr. Peek the Administrator, with the approval of the Secretary of Agriculture, and would receive compensation. His functions

would be advisory and he would have no power to take any official action or to give any orders which would have official effect."

You suggest that the partnership of (B) "may not speculate" in the manner described in subsection (g). It is believed that the meaning of the word "speculate" is well understood. United States v. Kettenbach, et al., 208 Fed. 209; Outlook Farmers' Elevator Company v. American Surety Company, 223 Pac. 905. In the first of these cases, it was contended that the patents involved therein should be declared fraudulent and void on the single ground that the evidence established the fact that the entrymen applied to purchase the lands described in their entries for the purpose of speculation, Section 2 of the Act of June 3, 1878, requiring the entryman to set forth in his sworn statement, among other things:

"That he does not apply to purchase the same (the land) on speculation, but in good faith to appropriate it to his own exclusive use and benefit."

In answer to this contention, the Circuit Court of Appeals for the Ninth Circuit said (p. 213):

"The definition of the word 'speculation' is given by Webster as 'the act or practice of buying land, goods, shares, etc., in expectation of selling at a higher price'. It may be conceded that, when the entrymen made entry of the lands in controversy, it was with the expectation that they would sell them at a higher price; but we are not required to dispose of these appeals upon these words of the statute."

The second of the cases cited involved an action by an elevator company against its former manager and his surety for funds misappropriated by the manager in grain gambling. In the course of its opinion in that case, the Court said (p. 910):

"In this connection it is interesting to observe that defendants offered to prove by Brown that, 'if an elevator company buys grain, and holds the same without hedging at their elevator for some time before selling the same, this is out of the ordinary way of doing business, and constitutes speculating in grain'; and again they offered to prove by the same witness that between July 1, 1915, and June 30, 1916, he bought grain for the elevator company and held the same for a rising market without hedging, and that such transaction 'constitutes speculating and gambling in grain'; that these transactions were known to the stockholders of the elevator company; that they accepted the profits derived from them, ordered the balance due to the commission house paid, and the remaining profits distributed as dividends, gave a vote of thanks to Brown, and employed him for another year. We think it would be safe to say that every transaction in

grain by an elevator company is speculative. The word 'speculate' means 'the act or practice of buying land, goods, shares, etc., in expectation of selling at a higher price.' Webster's International Dictionary. The elements which distinguish hedging, option, and future transactions, as such, from gambling transactions are set forth fully in Benson-Stabeck Co. v Reservation Farmers' Grain Co., 62 Mont. 254, 205 Pac. 651, and need not be repeated here. It would impeach the intelligence of any sane person to insist that the transaction described by Brown constituted gambling as that term is ordinarily understood."

You invite attention to the fact that subsection (g) begins with the words "no person shall, etc.", and you suggest that even if it were true that the firm of (B) speculates in the manner indicated in subsection (g), it might perhaps be argued that Mr. (A) will not, in his own person, speculate in that manner, as the "speculation", if any, will not be by Mr. (A).

Partnerships deal directly and consequently the act of a partnership within the scope of the partnership, is the act of all the partners. Subsection (g) not only disqualifies any "person" speculating "directly" but also "indirectly". If Mr. (A) continues as a partner of (B), it is my opinion that he will be speculating, at least, "indirectly" within the meaning of that term as used in subsection (g).

You raise a further question as to whether Mr. (A) will be "acting in any official capacity in the administration of" the Agricultural Adjustment Act. You observe that subsection (a) of Section 10 provides that "The Secretary of Agriculture may appoint such officers and employees * * * and such experts as are necessary to execute the functions vested in him by this title", and that subsection (e) provides that "The action of any officer, employee, or agent in determining the amount of and in making any rental or benefit payment shall not be subject to review by any officer of the Government other than the Secretary of Agriculture or Secretary of the Treasury"; and you suggest that the word "official" refers to the act of an officer as distinguished from an employee, expert, or agent, inasmuch as Section 10 makes a differentiation between officers and other persons performing duties under the Act.

In United States v. Van Leuven, 62 Fed. 62, the Court considered the question as to whether a member of a board of examining surgeons appointed by the commissioner of pensions, though not an "officer of the United States", was yet a person acting for or on behalf of the United States in an "official capacity", within the meaning of Section 5501 of the Revised Statutes, relating to bribery, which, as far as material here, provides:

"Every officer of the United States and every person acting for or on behalf of the United States, in any official capacity under or by virtue of the authority of any department or office of the government thereof."

In answering this question in the affirmative, Judge Shiras said (p. 65):

"It is urged in argument that this provision of the statute requires that the person must act in an official capacity and that this requirement can only be met when the person is an 'officer', as that term is defined in U. S. v. Germaine. This construction would wholly destroy the force of the second definition in section 5501. If no person can act in an official capacity, except an officer, and no one can be an officer, except one appointed in the mode provided in section 2, art. 2, of the constitution, then it was useless to place in section 5501 any other definition than that of the opening words, to wit, 'Every officer.' It is clear, however, that congress intended to include within the section persons other than those who were technically 'officers of the United States'; as that term is defined by the supreme court. The section includes all persons acting for or on behalf of the United States, under or by virtue of the authority of any department or office of the government, in an official capacity. The commissioner of pensions is appointed by the president, with the approval of the senate. Section 470, Rev. St. He is therefore, technically, an officer of the United States, although not the 'head of a department', as that term is used in section 2, art. 2, of the constitution. The branch of the public service placed under his management is an office, and is so repeatedly designated in the statutes of the United States. See sections 4721, 4747, 4748, 4776, Rev. St. By section 4 of the act of July 25, 1882, the commissioner of pensions is authorized to appoint surgeons to examine pensioners and claimants for pensions, or increase thereof; and he is authorized to organize boards of surgeons, to consist of three members, at such points in the states as he may deem necessary. Thus, we find that the commissioner of pensions is an officer of the government in charge of the office of the government which deals with pension matters; that the commissioner has the authority to appoint examining surgeons, and to organize examining boards of surgeons. Therefore, the persons thus appointed act under or by virtue of the authority lawfully exercised by the pension office through its head, the commissioner, the same being an office of the government. The authority under which they act is derived from the office of pensions, and their action is official, in that they act on behalf of an

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office of the government; and they act in an official capacity, because they are representatives of the pension office, and their services are in aid of the official duties committed to that office. A person may act in an official capacity because he is an officer lawfully appointed and qualified, and acts as such, or he may act in an official capacity because he lawfully performs duties which are of an official character."

Viewing section 10, particularly the language of subsection (g) "No person * * * acting in any official capacity", in the light of Judge Shiras' decision, it would seem to be quite clear that Congress did not intend to limit the word "official" as used in subsection (g), to "officers". The fact that Congress used the word "person" clearly indicates an intention that the word "official" was not intended to be limited to officers, since if Congress had so intended it would have used the word "officer" in lieu of the word "person".

Under all the circumstances, it is my opinion that Mr. (A) can not be appointed as an adviser to Mr. Peek and continue as a partner of (B) without violating Section 10 (g) of the Agricultural Adjustment Act.

Respectfully,

J. Crawford Biggs,
Acting Attorney General.

Honorable H. A. Wallace,
Secretary of Agriculture,
Washington, D. C.

Appendix 11

No A-2

SET-OFF AGAINST BENEFIT PAYMENTS OF
DEBTS DUE THE UNITED STATES

There is now no requirement of statute that debts due the United States by farmers be set off against rental or benefit payments to be made under Section 8(1) of the Agricultural Adjustment Act.

Opinion of the Attorney General
Dated August 8, 1933.

OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES
SET-OFF OF DEBTS OF FARMERS DUE THE UNITED STATES

August 8, 1933.

Sir:

I have the honor to reply to your letter of July 26, 1933, in which my opinion is requested upon the question whether debts of farmers due the United States are required to be set off against rental or benefit payments which you are authorized to make to them under Section 8 (1), Part 2, Title I, of the Agricultural Adjustment Act of May 12, 1933, as amended (Pub. No. 10, 73d Congress).

The provision in question gives the Secretary of Agriculture power--

"To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments. Under regulations of the Secretary of Agriculture requiring adequate facilities for the storage of any non-perishable agricultural commodity on the farm, inspection and measurement of any such commodity so stored, and the locking and sealing thereof, and such other regulations as may be prescribed by the Secretary of Agriculture for the protection of such commodity and for the marketing thereof, a reasonable percentage of any benefit payment may be advanced on any such commodity so stored. In any such case, such deduction may be made from the amount of the benefit payment as the Secretary of Agriculture determines will reasonably compensate for the cost of inspection and sealing, but no deduction may be made for interest."

The right of the United States to withhold or set off money due to a person against a debt due by such person to the Government has been recognized and exercised since the early days of our Government. It is not dependent upon the existence of a statute, but is the common right which belongs to every creditor to apply moneys payable by him to his debtor in settlement of sums due him by the debtor.

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Long before the first federal statute was enacted (Act of March 3, 1875, 18 Stat. 481; U. S. Code, Title 31, Section 227) upon the subject, the right was explained by the Supreme Court in Gratiot v. United States, 15 Peters (40 U. S.) 336 (decided January, 1841), wherein it was held that:

"The United States possess the general right to apply all sums due for such pay and emoluments, to the extinguishment of any balances due to them by the defendant, on any other account, whether owed by him as a private individual, or as chief engineer. It is but the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him. (Page 369 of the opinion.)"

The principle thus settled has been applied since that decision was rendered: McKnight v. United States, 98 U. S. 179, 186; Bonnafon v. United States, 14 Ct. Cls. 484, 489; Schooner Henry, et al v. United States, 35 Ct. Cls. 393, 395; and Barry v. United States, 229 U. S. 47. In the latter case the War Department had set off a debt due it against a debt it owed, and again the Court held:

"The liability might have been asserted by the Government in an action; but it might, as it did, charge it up as a set-off against its own liability. It would be folly to require the Government to pay under the one contract what it must eventually recover for a breach of the other. (Page 53 of the opinion.)"

There is no doubt, therefore, that the right of set-off has always been available to the Federal Government. Until the Act of 1875 was enacted, the exercise of the right was within the discretion of the accounting officers.

The Act of 1875 took away the discretion which accounting officers previously had in exercising the right, and made it the duty of the Secretary of the Treasury, upon presentation for payment of "any final judgment recovered against the United States or other claim duly allowed by legal authority", to withhold payment of an amount of such judgment or claim equal to any debt due the United States from the claimant. The full text of the Act as originally enacted was as follows:

"When any final judgment recovered against the United States or other claim duly allowed by legal authority, shall be presented to the Secretary of the Treasury for payment, and the plaintiff or claimant therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Secretary to withhold payment of an amount of such judgment or claim equal

to the debt thus due to the United States; and if such plaintiff or claimant assents to such set-off, and discharges his judgment or an amount thereof equal to said debt or claim, the Secretary shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff, or claimant denies his indebtedness to the United States, or refuses to consent to the set-off, then the Secretary shall withhold payment of such further amount of such judgment, or claim, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Secretary to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Secretary with 6 per centum interest thereon for the time it has been withheld from the plaintiff."

A definite course of procedure in settling Government accounts, which would result not only in prompt settlements, but also in avoiding all unnecessary litigation, was thus prescribed and made mandatory upon the Secretary.

On March 3, 1933, that Act was reenacted (Section 13, Pub. No. 428, 72d Congress) and changed to the extent of excluding the words "or other claim" from the first sentence of the Act, and substituting the "Comptroller General of the United States" for the "Secretary of the Treasury".

As the effect of the Act of 1875 was to take away the discretion which accounting officers previously had in exercising the right of set-off and to require them to make set-offs in respect to both judgments and claims, so now the effect of the amendment is to restore the discretion of exercising the set-off right with respect to claims, and to limit the duty of making set-offs to judgments. The report of the Committee (Senate Report No. 1021 on H. R. 13520, 72d Congress, 2d Session) which recommended the change in the Act, concludes with the statement that:

"The amendments eliminate from the statute the language with respect to claims, limiting the application of the statute to judgment creditors."

Since rental or benefit payments to be made under Section 8 (1) of the Act in question are not judgments, the Act of 1875, as amended, is not applicable to them.

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I have to advise you, therefore, that there is now no requirement of statute that debts due the United States by farmers be set off against rental or benefit payments to be made under Section 8 (1) of the Agricultural Adjustment Act of May 12, 1933.

Respectfully,

J. CRAWFORD BIGGS,
Acting Attorney General.

The Secretary of Agriculture.

Appendix 17

No. A-3

APPLICATION OF NATIONAL INDUSTRIAL
RECOVERY ACT TO THE PHILIPPINES

The National Industrial Recovery Act is not applicable to the Philippine Islands, insofar as it prescribes the formulation, approval and enforcement of codes of fair competition, but articles brought into continental United States are subject to the provisions of Section 3(e) of that Act concerning articles "imported into the United States" in such manner as to endanger the maintenance of any code or agreements under that Act.

Opinion of the Attorney General
Dated December 2, 1933.

OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES
APPLICATION OF THE NATIONAL INDUSTRIAL RECOVERY
ACT TO THE PHILIPPINE ISLANDS

Department of Justice,
December 2, 1933.

Sir:

I have the honor to refer to your letter of November 20th, requesting my opinion as to whether the National Industrial Recovery Act (48 Stat. 195, approved June 16, 1933) applies to the Philippine Islands:

Section 1 of the Act asserts a policy "to remove obstructions to the free flow of interstate and foreign commerce." Section 3 provides for the formulation of "codes of fair competition" and forbids violations of code standards "in any transaction in or affecting interstate or foreign commerce." Section 7(d) defines "interstate and foreign commerce" as including, unless otherwise indicated--

"trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States". [Italics supplied].

Section 3(e) provides, in part, as follows:

"On his own motion, or if any labor organization, or any trade or industrial organization, association, or group, which has complied with the provisions of this title, shall make complaint to the president that any article or articles are being imported into the United States in substantial quantities or increasing ratio to domestic production of any competitive article or articles and on such terms or under such conditions as to render ineffective or seriously to endanger the maintenance of any code or agreement under this title, the President may cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this subsection, and if, after such investigation and such public notice and hearing as he shall specify, the

President shall find the existence of such facts, he shall, in order to effectuate the policy of this title, direct that the article or articles concerned shall be permitted entry into the United States only upon such terms and conditions and subject to the payment of such fees and to such limitations in the total quantity which may be imported (in the course of any specified period or periods) as he shall find it necessary to prescribe in order that the entry thereof shall not render or tend to render ineffective any code or agreement made under this title. * * * [*Italics supplied*].

You state that the question has arisen particularly because of representations by proponents of a proposed code for the cordage and twine industry that "it is impossible for them to install proper labor conditions for employees in the continental United States" and at the same time meet competition from the Philippine Islands in view of the labor conditions prevailing there.

You apparently assume that Section 3 (e) applies only to "imports" from foreign countries and, therefore, does not extend to articles brought into continental United States from the Philippine Islands, but I take this to be only a corollary of the conclusion reached by your legal staff that the code provisions of the Act do apply to the Philippine Islands, for the two questions are not entirely separable. The Legal Division of the Agricultural Adjustment Administration, as appears from memoranda submitted to me, has concluded that section 3 (e) does apply and that the code provisions do not apply. The Judge Advocate General of the Army, likewise, has concluded that the code provisions are not applicable in the Philippine Islands and, while he has not so stated in express language, his treatment of the subject indicates an assumption that section 3 (e) is applicable.

The Act of August 29, 1916, c. 416, 39 Stat. 545, 547 (U.S.C. Title 48, Sec. 1003) provided:

"That the statutory laws of the United States hereafter enacted shall not apply to the Philippine Islands, except when they specifically so provide, or it is so provided in this Act."

There is no clear statement in the National Industrial Recovery Act that the code provisions thereof shall apply in the Philippine Islands. Your Legal Research Division has relied upon the words of the statutory definition of "interstate and foreign commerce" as including trade or commerce "within * * * any insular possession or other place under the jurisdiction of the United States", but this will not suffice in view of the precedents and practice.

The Narcotic Drugs Import and Export Act, which defined its geographical application as including "the United States or any territory under its control or jurisdiction", was considered by the

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Attorney General in an opinion of October 17, 1925, 34 Op. 550, 551, and the conclusion reached that "while ordinarily such language might be construed as embracing the United States and all of its possessions, such interpretation is not permissible when the language is measured by the test laid down in the Act of August 29, 1916." The principle is further illustrated by an opinion of July 28, 1927, (35 Op. 281, 283) which stated that: "The National Prohibition Act although made applicable by its terms to all territory subject to the jurisdiction of the United States in substantially the language of the Eighteenth Amendment is not in force in the Philippine Islands * * *."

Considering, on the other hand, the question of application or non-application of section 3 (e), it is important to note that the Tariff Act of 1930, 46 Stat. 590, 685, specifically provides that the duties therein levied "upon all articles when imported from any foreign country into the United States" shall also be collected and paid "upon all articles coming into the United States from the Philippine Islands", with some express exceptions which do not affect the principle. Goods brought in from the Philippine Islands are "imports", within the purview of the provision of the tariff laws forbidding "unfair methods of competition and unfair acts in the importation of articles into the United States", and, as such, are subject to exclusion by order of the President after investigation by the Tariff Commission, as pointed out by the Attorney General in an opinion of July 25, 1927 (35 Op. 273, 281).

Considering the foregoing, it is my opinion that the National Industrial Recovery Act is not applicable to the Philippine Islands, in so far as it prescribes the formulation, approval and enforcement of codes of fair competition, but that articles brought into continental United States from the Philippine Islands are subject to the provisions of section 3 (e) of that Act concerning articles "imported into the United States" in such manner or in such circumstances "as to render ineffective or seriously endanger the maintenance of any code or agreement."

Respectfully,

HOMER CUMMINGS.

To the National Recovery Administrator.

Appendix 23

No. A-4

CONTRACTS WITH MEMBERS OF CONGRESS UNDER
AGRICULTURAL ADJUSTMENT ACT

Benefit payments under contracts with Congressmen for reduction of cotton acreage, which contracts have already been executed, should be withheld pending the direction of Congress.

No objection is seen to the waiver by Congressmen who have heretofore entered into such contracts, of a waiver of compensation or renunciation of compensation, although the legal effect thereof would not be clear if the contracts were considered within the prohibitions of Sections 114, 115 and 116 of the Criminal Code.

No further contracts or agreements of any kind should be entered into with members of Congress until and unless it shall be otherwise provided by statute.

Opinion of the Attorney General
Dated December 16, 1933.

OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES

CONTRACTS WITH MEMBERS OF CONGRESS UNDER AGRICULTURAL ADJUSTMENT ACT AND NATIONAL INDUSTRIAL RECOVERY ACT

Department of Justice,
December 16, 1933.

Sir:

I have the honor to refer to your letter of November 20th, requesting my opinion as to the legality of entering into the contracts or agreements contemplated by section 8 of the Agricultural Adjustment Act (approved May 12, 1933) and section 4 of the National Industrial Recovery Act (approved June 16, 1933) with members of Congress who are also engaged in agriculture, trade or industry or are interested as land owners or lien holders.

The pertinent statutory provisions are copied below.

Agricultural Adjustment Act:

"Sec. 8. In order to effectuate the declared policy, the Secretary of Agriculture shall have power--

"(1) To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments. Under regulations of the Secretary of Agriculture requiring adequate facilities for the storage of any nonperishable agricultural commodity on the farm, inspection and measurement of any such commodity so stored, and the locking and sealing thereof, and such other regulations as may be prescribed by the Secretary of Agriculture for the protection of such commodity and for the marketing thereof, a reasonable percentage of any benefit payment may be advanced on any such commodity so stored. In any such case, such deduction may be made from the amount of the benefit payment as the Secretary of Agriculture determines will reasonably compensate for the cost of inspection and sealing, but no deduction may be made for interest.

"(2) To enter into marketing agreements with processors, associations of producers, and others engaged in the handling, in the current of interstate or foreign commerce of any agricultural commodity or product thereof, after due notice and opportunity for hearing to interested parties. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: Provided, That no such agreement shall remain in force after the termination of this Act. For the purpose of carrying out any such agreement the parties thereto shall be eligible for loans from the Reconstruction Finance Corporation under section 5 of the Reconstruction Finance Corporation Act. Such loans shall not be in excess of such amounts as may be authorized by the agreements."

National Industrial Recovery Act:

"Sec. 4 (a) The President is authorized to enter into agreements with, and to approve voluntary agreements between and among, persons engaged in a trade or industry, labor organizations, and trade or industrial organizations, associations, or groups, relating to any trade or industry, if in his judgment such agreements will aid in effectuating the policy of this title with respect to transactions in or affecting interstate or foreign commerce; and will be consistent with the requirements of clause (2) of subsection (a) of section 3 for a code of fair competition."

Sections 114, 115 and 116 of the Criminal Code (U.S.C., Title 18, Sec. 204-206), concerning the making of contracts or agreements with members of Congress, read as follows:

"Sec. 114. Whoever, being elected or appointed a Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement, made or entered into in behalf of the United States by any officer or person authorized to make contracts on its behalf, shall be fined not more than three thousand dollars. All contracts or agreements made in violation of this section shall be void; and whenever any sum of money is advanced by the United States, in consideration of any such contract or agreement, it shall forthwith be repaid; and in case of failure or refusal to repay the same when demanded by the proper officer of the department under whose authority such contract or agreement shall have been made or entered into, suit shall at

once be brought against the person so failing or refusing and his sureties, for the recovery of the money so advanced.

"Sec. 115. Whoever, being an officer of the United States, shall on behalf of the United States, directly or indirectly make or enter into any contract, bargain, or agreement, in writing or otherwise, with any Member of or Delegate to Congress, or any Resident Commissioner, after his election or appointment as such Member, Delegate, or Resident Commissioner, and either before or after he has qualified, and during his continuance in office, shall be fined not more than three thousand dollars.

"Sec. 116. Nothing contained in the two preceding sections shall extend, or be construed to extend, to any contract or agreement made or entered into, or accepted, by any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company; nor to the purchase or sale of bills of exchange or other property by any Member of or Delegate to Congress, or Resident Commissioner, where the same are ready for delivery, and payment therefor is made, at the time of making or entering into the contract or agreement."

The foregoing provisions of the Criminal Code originated in the Act of April 21, 1808, c. 48, 2 Stat. 484. Attorney General Legare (4 Op. 47) interpreted them as not forbidding a contract with a partnership which included a Congressman when he (the Congressman) specifically waived any beneficial interest. Attorney General Rodney (5 Op. 697) held that the statute did not invalidate a contract made with a private citizen who subsequently became a member of Congress. Attorney General Garland (18 Op. 286) concluded that the statute did not disqualify a member of Congress to become a surety on a contractor's bond.

Nevertheless, a United States Senator, who professed to rely upon Attorney General Rodney's opinion, was prosecuted in connection with a lease to the United States executed by him at a time previous to his election to the Senate, the indictment charging that subsequent to such election he did "hold and enjoy" the said contract contrary to the statute. United States v. Dietrich, 126 Fed. 671, 673, 676. A demurrer to the indictment was overruled upon grounds indicated in the following excerpt from the opinion, written by Judge Van Devanter:

"We think it is entirely clear that the purpose and effect of this legislation is to absolutely inhibit all contractual relations with the United States upon the part of any member of or delegate to Congress through 'any contract or agreement made or entered into in behalf of the United States, by any officer or person authorized to make contracts on behalf of the United States,' save in

the instances specifically excepted by section 3740.

* * * It plainly includes 'any contract or agreement,' no matter how fairly obtained or held, how reasonable in its terms, or how advantageous to the United States.

* * * The purpose of the statute is to effectually close the door to the temptation which is incident to contractual relations between the government and members of Congress.

* * *

"The construction of a doubtful or ambiguous statute by the Attorney General in the discharge of his duty to render opinions upon questions of law arising in the administration of any of the executive departments is always entitled to respectful consideration, and where that construction is acted upon for a long time by those charged with the duty of executing the statute it ought not to be overruled without cogent reasons. * * * But this rule is not applicable to statutes which are plain and unambiguous."

Subsequently, Attorney General Bonaparte (26 Op. 537, 540) concluded that the statute forbade certain contemplated "agreements for the purchase of lands, for water rentals, for conveyance of water rights, and similar instruments, contractual in form, relating to the adjustment of vested water rights, executed in behalf of the United States by some officer of the Reclamation Service for purposes within the purview of the Reclamation Act (32 Stat. 388)," making the following pertinent observations.

"From the nature of the contract transmitted with your note it is manifest that in case a person with whom it is desired to make such a contract is a Member of, or Delegate to, Congress, it would interfere with the carrying out of what is contemplated by the reclamation act referred to, if he could not enter into such contract, when willing to do so; and that it would be to the advantage of the Government to be permitted to make such Member the same kind of contract that it makes with any other person in aid of such reclamation project. And it may well be thought as it is urged here, that Congress did not intend that these sections should operate to prohibit such contracts as these, and that, had the attention of Congress been called to this, it would have modified these sections as to their application to the reclamation act.

"But in dealing with a statute fairly plain in its meaning, such considerations have no place; and in such cases the legislative intent, even if it were susceptible of legal ascertainment, cuts little figure except as it is expressed in legislative enactments, and

when so expressed the legal meaning of what is said must be taken to express the legislative intent, wherever that intent is material."

I cannot doubt that it is a duty of members of Congress, no less than of other citizens, to cooperate in the carrying out of the recovery plans enacted in the Agricultural Adjustment Act and the National Industrial Recovery Act; and it is truly an anomaly if one statute penalizes the doing of that which under another statute is a duty. Certainly there is no turpitude involved in the mere making of the proscribed agreements under such circumstances.

Nevertheless, to the extent that they contemplate payment of compensation by the United States, it may well be that they are not distinguishable from others as providing opportunity for evil. As pointed out by Judge Van Devanter, and further illustrated by the opinion of Attorney General Bonaparte, particular contracts are not forbidden because vicious, nor permitted because good, advantageous or even essential to the furtherance of a public interest. The conclusion was that all contracts or agreements, save as specified in the Act, are prohibited and that the statute, being unambiguous, is not subject to a construction which might narrow its application.

You state that some contracts with Congressmen for reduction of cotton acreage have already been executed, through oversight or inadvertance, but that you have deemed it advisable to withhold payment of compensation thereunder pending direction by Congress. I approve your conclusion in this respect. I also perceive no objection to the execution by Congressmen, who have heretofore entered into the contracts, of a waiver of compensation or a renunciation of compensation, in language such as you suggest, although the legal effect thereof would not be clear if the contracts were considered as within the statutory inhibition.

In conclusion, I must advise that you refrain from entering into further contracts or agreements of any kind with members of Congress until and unless it shall be otherwise provided by statute. Indeed, it is quite improbable that members of Congress would execute such contracts, except through inadvertance or oversight, in view of the penal statute and the broad scope which has heretofore been attributed to it, even though it should now be administratively concluded that the contracts are permitted.

Respectfully,

HOMER CUMMINGS.

To the Secretary of Agriculture.

Appendix 31

No. A-5

COMPUTATION OF QUOTA OF TAX EXEMPT

SHORT STAPLE COTTON

The amount of long staple cotton heretofore produced in Arizona is not to be taken into consideration in determining that state's quota of the national allotment under the Bankhead Act.

Opinion of the Attorney General
Dated May 23, 1934.

OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES

COMPUTATION OF ARIZONA'S QUOTA OF TAX-EXEMPT SHORT
STAPLE COTTON

May 23, 1934.

The Secretary of Agriculture.

My Dear Mr. Secretary:

I have the honor to comply with your request of May 22, for my opinion whether long staple cotton ("one and one-half inches in length or longer") produced in Arizona is to be taken into consideration when determining that State's quota of tax exempt short staple cotton which may be produced in the years 1934-1935, under the Act of April 21, 1934, which, in so far as here pertinent, reads as follows:

"Sec. 3 (c). For the crop year 1934-1935 ten million bales is hereby fixed as the maximum amount of cotton of the crop harvested in the crop year 1934-1935, that may be marketed exempt from payment of the tax herein levied. * * *"

"Sec. 4 (a). There is hereby levied and assessed on the ginning of cotton hereafter harvested during a crop year with respect to which this Act is in effect, a tax at the rate per pound * * *."

"Sec. 4 (e). No tax shall be imposed under this Act with respect to--

"(1) Cotton harvested by any publicly owned experimental station or agricultural laboratory.

"(2) An amount of cotton harvested in any crop year from each farm equal to its allotment.

"(3) Cotton harvested prior to the crop year 1934-1935.

"(4) Cotton having a staple of one and one half inches in length or longer."

"Sec. 4 (g). The right to exemption under paragraph (2) of subsection (e) shall be evidenced by a certificate of exemption issued as herein provided, which certificate of exemption shall be conclusive proof of the right to such exemption."

"Sec. 5 (a). When an allotment is made, in order to prevent unfair competition and unfair trade practices in marketing cotton in the channels of interstate and foreign commerce, the Secretary of Agriculture shall apportion to the several cotton-producing States the number of bales the marketing of which may be exempt from the tax herein levied, which shall be determined by the ratio of the average number of bales produced in each State during the five crop years preceding the passage of this Act to the average number of bales produced in all the States during the same period: Provided, however, That no State shall receive an allotment of less than two hundred thousand bales of cotton if in any one year of five years prior to this date the production of the State equalled two hundred and fifty thousand bales. It is prima facie presumed that all cotton and its processed products will move in interstate or foreign commerce."

The exemption of long staple cotton (Sec. 4, c, 4) was added to the bill by an amendment, introduced by Senator Hayden, and in connection therewith the following explanation was given (Cong. Rec. v. 78, pp. 5285, 5633, 5636):

"MR. HAYDEN. Mr. President, the pending bill provides that the production of all cotton shall be limited to 10,000,000 bales. My amendment will release from that limitation cotton having a staple of 1 1/2 inches or longer. The only variety of cotton produced in the United States having a staple of 1 1/2 inches or longer is so-called 'American-Egyptian' or Pima cotton, which is grown in Arizona and southern California."

"* * * It is not in competition with any cotton produced in the main Cotton Belt, where none of the varieties now grown commercially have a staple longer than about 1 3/8 inches. * * *

"In the characters of the plants, as well as of the lint, Egyptian cotton is very different from all other cotton grown in the United States. It differs even in the manner in which it is processed, being ginned on roller gins instead of saw gins. * * *"

"I might add, Mr. President, that for all useful purposes this long-staple cotton might be considered as a crop other than cotton such as wool or mohair.
* * *"

"MR. HAYDEN. In Arizona and southern California there is a certain acreage which may be planted to long-staple cotton or short-staple cotton. My amendment will take out of cultivation an acre of short-staple cotton every time an acre of long-staple cotton is planted, and that is exactly the tendency the bill

seeks to foster. * * *

"MR. SMITH. I do not think the Senate understands exactly the situation. This type of cotton really is not counted in the ordinary upland cotton for which we receive quotations."

"MR. HAYDEN. That is correct."

Section 3 (c) of the Act limits to 10,000,000 bales the amount of cotton "that may be marketed exempt from payment of the tax herein levied." This necessarily has reference to the exemption in Section 4 (e) (2) of "an amount of cotton harvested in any crop year from each farm equal to its allotment," because the other exemptions are without limit as to quantity, are not subject to allotment, and no tax exemption certificates with respect thereto are provided. Therefore, long staple cotton is not included in the 10,000,000 bales subject to allotment; and this conclusion alone gives effect to the amendment above mentioned, which was purposed to remove long staple cotton from the restriction imposed by the allottable maximum of 10,000,000 bales.

The direction in Section 5(a) that the Secretary "shall apportion to the several cotton-producing States the number of bales the marketing of which may be exempt from the tax herein levied," refers to the allottable bales (10,000,000 for the years 1934-1935 which, as above indicated, does not include long staple cotton). Continuing, the section provides that the apportionment of this 10,000,000 bales "shall be determined by the ratio of the average number of bales produced in each state during the five crop years preceding the passage of this Act to the average number of bales produced in all the States during the same period." The word "bales", twice repeated in the last quoted clause, logically and grammatically contemplates "bales" of the kind last previously mentioned, that is, "bales" of the kind included in the 10,000,000.

If the statute is read in this manner the result is logical and equitable--the quantity of short staple cotton which will be exempt from the tax is, for each state, an identical percentage of its average during the preceding five years, except as the matter may be affected by the proviso concerning a minimum of 200,000 bales. If, on the other hand, long staple cotton should be taken into consideration when determining a state's quota of tax exempt short staple cotton this would result in a distinct discrimination, so that Arizona would be privileged to produce approximately fifteen per cent. more tax exempt short staple cotton per average number of bales of such cotton heretofore produced than would any other state save California, which would enjoy a like advantage somewhat less in degree--in addition to the right to raise tax exempt long staple cotton in unlimited quantities--except, of course, as the matter may

be affected by the proviso concerning a minimum of 200,000 bales.

For the foregoing reasons I concur in the view which has been adopted in the Agricultural Adjustment Administration in reliance upon the General Counsel's opinion, that the amount of long staple cotton heretofore produced in Arizona is not to be taken into consideration when determining that state's quota of the national allotment of 10,000,000 bales, which figure, as I have indicated, is not to be understood as including long staple cotton.

Respectfully,

HOMER CUMMINGS,
Attorney General.

A

No. A-6

APPLICATION OF NATIONAL INDUSTRIAL
RECOVERY ACT TO PUERTO RICO,
HAWAII AND ALASKA

Title I of the National Industrial Recovery Act
is in full force and effect in Puerto
Rico, Hawaii and Alaska.

Opinion of the Attorney General
Dated June 7, 1934.

OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES

NATIONAL INDUSTRIAL RECOVERY ACT AS IT APPLIES TO
THE TERRITORIES OF PUERTO RICO, HAWAII AND ALASKA

June 7, 1934.

My Dear Mr. President:

I am returning herewith in revised form the proposed Executive Order delegating to the Administrator for Industrial Recovery authority to enter into agreements pursuant to section 4 (a) of Title I of the National Industrial Recovery Act with persons engaged in a trade or industry in the Territories of Puerto Rico, Hawaii and Alaska, which was submitted for my consideration at your direction by your Assistant Secretary Mr. McIntyre on May 28, 1934.

By section 2 (b) of the National Industrial Recovery Act, you are authorized to delegate any of your functions and duties under the act and the only question presented is whether the National Industrial Recovery Act applies to the Territories named.

Section 7 (d) of the National Industrial Recovery Act defines "interstate and foreign commerce" as including, unless otherwise indicated, "trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States."

I find no provisions in the National Industrial Recovery Act which specifically or impliedly except from the provisions of the Act the Territories named, and in the absence of such provisions the above-quoted language seems to be sufficiently broad to include them.

If, however, the language of Section 7 (d) does not make the National Industrial Recovery Act applicable to these Territories, there are other statutes which clearly remove any doubt in the matter.

Title 48, section 23, U.S.C., relating to Alaska provides as follows:

"The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States. All the laws of the

United States passed prior to August 24, 1912, establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; except as herein provided all laws in force in Alaska prior to that date shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature."

Similar provisions are contained in sections 495 and 734 of Title 48 of the United States Code relating to Hawaii and Puerto Rico, respectively.

The above-cited statute relating to Puerto Rico has been construed by the Attorney General in connection with the National Bank Act. See 23 Ops. Atty. Gen. 169. In considering the question as to whether the National Bank Act was applicable to Puerto Rico, Attorney General Griggs said:

"By virtue of this provision broad extension of all the statutory laws of the United States, not locally inapplicable, is made to the island of Porto Rico, the only exception being the internal-revenue laws, which are excepted by name, and such other laws as are in the said act otherwise provided. This language is broad enough to extend to Porto Rico the laws relating to the organization and powers of national banks, unless there be in such laws something indicating that they are locally inapplicable to Porto Rico, or that they are so locally applicable to some other place or places of specific character as to make them practically inapplicable locally to Porto Rico. An examination of the various sections of the Revised Statutes and subsequent acts of Congress relative to national banks discloses no provisions which are locally inapplicable to Porto Rico. There seems to be in the structure of the national banking laws no general provisions which can not be carried into force and effect in Porto Rico equally with all of the various States and Territories to which the laws were originally applied. I can find no reason to hold that the statutes relative to the organization and powers of national banks have not, by section 14 of the Porto Rican act above referred to, been extended to that Island. The language of that section is broad enough, and in my opinion does, authorize the organization and carrying on of national banks in Porto Rico."

A similar conclusion was reached by Attorney General Griggs in connection with the statute relating to Hawaii. See 23 Ops. Atty. Gen. 177.

The statute relating to Alaska was construed with a like effect by Attorney General Miller on October 24, 1890. See 19 Ops. Atty. Gen. 678. See also 24 Ops. Atty. Gen. 86, wherein it was held that the Immigration Act was applicable to Puerto Rico.

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I agree with the conclusions reached by my predecessors in the opinions above-cited and since I find nothing in the National Industrial Recovery Act which would indicate that it is locally inapplicable to the territories named, it is my opinion that Title I of the said act is in full force and effect in the Territories of Puerto Rico, Hawaii and Alaska.

I have made certain changes in the order to secure more appropriate form but the sense thereof has not been altered. The revised draft has my approval as to form and legality.

Respectfully,

WILLIAM STANLEY,
Acting Attorney General.

The President,
The White House.

No. 1-7

FEDERAL TAX ON CHECKS UPON FUNDS
OF MARKET ADMINISTRATOR

Checks issued by the Market Administrator upon funds which are obtained under the Indianapolis Milk License are subject to the 2-cent federal tax on checks.

While the Market Administrator is designated as an officer of the United States, he is also acting as a representative for private parties. In the fulfillment of the duties of his office, the funds used are not "public funds" within the Treasury Regulations.

Ruling of the Commissioner of Internal Revenue
Dated September 18, 1934.

THE HISTORY OF THE
CITY OF BOSTON

From the first settlement of the
city in 1630 to the present time
the city has grown from a small
village to a large metropolis
and has become one of the most
important cities in the world.
The city has a rich history
and a proud tradition.
It has been the center of
commerce and industry for
many years.

THE HISTORY OF THE
CITY OF BOSTON

TREASURY DEPARTMENT
Washington

September 18, 1934

United States Department of Agriculture,
Agricultural Adjustment Administration,
Washington, D. C.

Attention: Mr. Victor Christgau,
Acting Administrator.

Gentlemen:

Reference is made to your letter of August 17, 1934, requesting a ruling as to the taxability of checks drawn by a Market Administrator upon funds which are obtained under the Indianapolis Milk License and which are deposited in the Indiana National Bank, under the provisions of Section 751 of the Revenue Act of 1932.

The office of the Market Administrator administers the Federal Milk Licenses for various areas issued by the Agricultural Adjustment Administration for the particular area and the Market Administrator is an appointee of, and under the direct control of, this Government agency. The office is financed, under the terms of the licenses for each of the areas, by charges made against milk producers licensed by the Market Administrator based on the quantity of milk sold while operating under such licenses.

From a review of a copy of the Indianapolis Milk License, submitted by you, it appears that the Market Administrator is appointed by the Secretary of Agriculture and obtains funds to operate his office in the manner as stated above. It is also noted, under this license, that whenever the Market Administrator has a balance on hand with respect to certain amounts he may distribute such balance, or any part thereof, in an equitable manner among producers who are licensed.

Article 36 of Regulations 42, Revised October 1932, as amended by Treasury Decision 4396, approved October 9, 1933,

provides that checks, drafts, or orders for the payment of money, drawn against public funds by officers of the United States, are not subject to the tax. The term "public funds" as used in the Treasury Decision, includes funds on deposit for the benefit of the public.

It is apparent that while the Market Administrator of Federal Milk Licenses is designated as an officer of the United States, he is also acting as a representative for private parties. In the fulfillment of the duties of his office the funds used are not "public funds" within the meaning and intent of Article 36, as amended, of Regulations 42.

It is held, therefore, in the instant case, that checks issued by the Market Administrator, Federal Milk License Indianapolis Area, are subject to the tax imposed by section 751 of the Revenue Act of 1932.

Respectfully,

Guy T. Helvering,
Commissioner.

No. A-8

CORPORATION TO AID IN ECONOMIC REHABILITATION
OF PUERTO RICO

Questions relating to the organization of a corporation under the laws of Delaware are not properly the subject of opinion by the Attorney General.

The Secretary of Agriculture may enter into contracts with such a corporation within the limits of his authority and the powers of the corporation under its charter, provided the plan to be effectuated is one appropriately executed through contract and does not involve the delegation of a discretion vested in the Secretary or any other officer.

Opinion of the Attorney General
Dated September 19, 1934.

OFFICE OF THE ATTORNEY GENERAL

Washington, D.C.

September 19, 1934.

The Honorable

The Secretary of Agriculture.

The Honorable

The Secretary of the Interior.

Gentlemen:

I have the honor to refer to your letters of recent date, jointly submitting for my consideration the following questions, which have also been the subject of several conferences with representatives of your respective departments and of the government of Puerto Rico:

"1. May a corporation be organized in the manner and for the purposes set forth in the attached proposed certificate of incorporation?

"2. May the Secretary of Agriculture, having formulated a plan to carry out the purposes of Section 15 (f) of the Agricultural Adjustment Act, as amended, or any of them, contract with the corporation organized as per the proposed certificate of incorporation for the execution of such plan, and in consideration of the corporation's agreement to carry out the plan, agree, with the approval of the President, to pay to said corporation processing taxes collected or to be collected on Puerto Rican Sugar and held, or to be held, as a separate fund in the name of Puerto Rico?

"3. Does the prohibition contained in Section 3 of the Joint Resolution of Congress of May 5, 1900 (31 Stat. 716), preclude the proposed corporation from owning and controlling more than 500 acres of land in Puerto Rico, when such land is acquired for the purpose of ultimate redistribution?"

As I understand the matter, it is proposed to organize, under the laws of Delaware and without the use of federal funds, a private, non-profit corporation to aid in the economic rehabilitation of the people of Puerto Rico, its intended activities being described as substantially similar in kind and scope to those of The Virgin Islands Company, which was considered in my opinion of March 19, 1934. The members will include "persons who from time to time may occupy the offices of the Secretary of the Interior and Federal Emergency Administrator of Public Works, the Secretary of Agriculture, the Federal Emergency Relief Administrator, the Governor of the Farm Credit Administration, the Governor of Puerto Rico, the Under Secretary of Agriculture, and the Assistant Secretary of the Interior, respectively."

No federal statute forbids the organization of such a corporation and, on the other hand, it is not suggested that any federal statute authorizes it. Questions relating to its organization, therefore, are dependent upon the laws of Delaware and are not properly the subject of any opinion by me. However, I am glad to inform you of my view, in accordance with the understanding had at the above mentioned conferences, that the status of the corporation as a private one will not be affected by the fact that its membership will include persons who are also officers of the United States and of Puerto Rico, respectively.

Appendix 51

Answering your second question, as definitely as the exigencies permit, the Secretary of Agriculture, in his official capacity, may enter into contracts with the corporation within the limits of his authority and the powers of the corporation under its charter. No plan or contract has been submitted to me. However, assuming validity of the plan which may be adopted, I have no doubt of the power to contract for its execution, further assuming, of course, that the plan is of such character as appropriately to be executed through contract and does not involve the delegation of a discretion vested in the Secretary of Agriculture or any other officer.

I have considered, in this connection, the possible effect of Section 1783 R. S., as amended (U.S.C. Title 18, Sec. 93), which provides:

"No officer or agent of any corporation, joint-stock company, or association, and no member or agent of any firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation, joint-stock company, association, or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation, joint-stock company, association, or firm. Whoever shall violate the provision of this section shall be fined not more than \$2,000 and imprisoned not more than two years."

This Section, being penal in nature, is to be strictly construed, as pointed out in 24 Op. A. G. 557, 559. It was obviously directed at business transactions involving gain and, in my opinion, presents no necessary obstacle here. The situation in this respect is similar to that existing in connection with the Virgin Islands Company,

which included as members the persons occupying the offices of the Secretary of the Interior and Governor of the Virgin Islands, respectively, and the making of contracts with which was considered in my opinion of March 19, 1934. Furthermore, I am mindful of the fact that the American Red Cross, a highly purposed, non-profit corporation, has during many years maintained contractual relationships with the United States and at the same time has included among its incorporators representatives of several Departments of the Government (U.S.C. Title 36, Sec. 5, et seq.).

Concerning the provision in Section 3 of the Joint Resolution of May 1, 1900, 31 Stat. 715, 716, that "every corporation hereafter authorized to engage in agriculture," including foreign corporations, shall be restricted to the ownership and control of not exceeding five hundred acres of land, I concur in the view of the Attorney General of Puerto Rico and of the law officers of your departments that if a valid contract necessitated in its execution the acquisition by the corporation of land in the furtherance of a federal project, the provision mentioned would constitute no impediment. It was not intended to limit land ownership by the United States or by a person or corporation acting in behalf of the United States. Furthermore, any later statute which may, expressly or by necessary implication, authorize such acquisition of land in larger quantities, would prevail over the earlier legislation.

Respectfully,

s. HOMER CUMINGS

Attorney General

No. A-9

TERMINATION OF TAX UNDER BANKHEAD ACT

A finding and proclamation by the President, under Section 2 of the Bankhead Act, that the economic emergency in cotton production and marketing has ceased to exist would terminate the taxing provisions of the statute with respect to all cotton harvested after the effective date of the proclamation.

Such a finding and proclamation, expressly stated to be under and for the purposes of the Bankhead Act, would have no effect upon the Agricultural Adjustment Act.

Opinion of the Attorney General
Dated September 22, 1934.

OFFICE OF THE ATTORNEY GENERAL

WASHINGTON, D. C.

September 22, 1934.

The Honorable

The Secretary of Agriculture.

My dear Mr. Secretary:

I have the honor to comply with your request of September 18 for my opinion upon the following questions arising under the Bankhead Cotton Control Act, approved April 21, 1934.

"Is there any legal authority other than that contained in Section 2 of the Cotton Control Act, to suspend or eliminate the tax levied on cotton by that Act?

"If the President finds that the economic emergency in cotton production and marketing has ceased to exist, can that finding be limited to this year's cotton crop and the tax levied thereon, or would such proclamation by the President terminate the operation of the Act?

"If the President proclaims that the economic emergency in cotton production and marketing has ceased to exist, what effect, if any, would that action have on further operations concerning cotton under the Agricultural Adjustment Act including rentals, benefit payments and processing taxes?"

Section 2 of the Act reads as follows:

"SEC. 2. The provisions of this Act shall be effective only with respect to the crop years 1934-1935, but if the president finds that the economic emergency in cotton production and marketing will continue or is likely to continue to exist so that the application of this Act with respect to the crop year 1935-1936 is imperative in order to carry out the policy declared in section 1, he shall so

proclaim, and this Act shall be effective with respect to the crop year 1935-1936. If at any time prior to the end of the crop year 1935-1936, the President finds that the economic emergency in cotton production and marketing has ceased to exist, he shall so proclaim, and no tax under this Act shall be levied with respect to cotton harvested after the effective date of such proclamation."

There is no other provision for suspending or eliminating the tax levied by the statute and, aside from such authority, there is no power in any executive officer to suspend the operation of a tax levied by act of Congress.

The provision that, upon the proscribed finding and proclamation by the President, "no tax under this Act shall be levied with respect to cotton harvested after the effective date of such proclamation," is apparently clear and, therefore, not subject to construction. Even assuming that resort to construction were permissible, nothing appears which would indicate an intention that the effect of the proclamation and consequent termination of the tax might be limited to this year's crop. I therefore conclude that such a finding and proclamation by the President would terminate the taxing provisions of the statute with respect to all cotton harvested after the effective date of the proclamation.

Answering your third question, it is my opinion that a finding and proclamation by the President of the termination of "the economic emergency in cotton production and marketing," expressly stated to be made under and for the purposes of the Act of April 21, 1934, would have no effect upon the Agricultural Adjustment Act, approved May 12, 1933, which was passed to meet a general economic emergency

in relation to agriculture. It provided for termination upon proclamation by the President in the following language:

"SEC. 12. This title shall cease to be in effect whenever the President finds and proclaims that the national economic emergency in relation to agriculture has been ended; and pending such time the President shall by proclamation terminate with respect to any basic agricultural commodity such provisions of this title as he finds are not requisite to carrying out the declared policy with respect to such commodity. The Secretary of Agriculture shall make such investigations and reports thereon to the president as may be necessary to aid him in executing this section."

The Cotton Control Act was passed more than a year later to meet special conditions in connection with cotton and to afford relief beyond and in addition to the relief provided by the earlier statute. It is rather to be assumed that the particular conditions which prompted the passage of the Cotton Control Act either did not exist or were not recognized by Congress as existing at the time of the passage of the Agricultural Adjustment Act; and it is also just as reasonable an assumption that those conditions may cease to exist earlier than the conditions which the Agricultural Adjustment Act was designed to remedy.

Respectfully,

HOMER S. CUMMINGS

Attorney General.





